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Recent Decisions

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ACT OF STATE–HICKENLOOPER AMENDMENT NOT AN EXPANSION OF THE "BERNSTEIN EXCEPTION"

Plaintiff, Banco Nacional de Cuba (hereinafter Banco),[1] brought suit in the District Court for the Southern District of New York to recover the excess realized on the sale of collateral that secured a one year renegotiated loan[2] for ten million dollars[3] made in 1960 by defendant, First National City Bank of New York (hereinafter Citibank). Shortly after the renegotiation, the Cuban Government nationalized defendant's eleven Cuban branch offices.[4] Citibank sold the collateral for an estimated twelve million dollars, and retained the entire amount on the grounds that the excess over the amount of the loan could be retained as partial compensation for the expropriated properties. Ruling that the holding announced in *Banco Nacional de Cuba v. Sabbatino*[5] was, in effect, overruled by the Hickenlooper amendment[6] and that the amendment was applicable, the district

1. Banco was the financial agent of the Cuban Government: "There is no serious question that the Government of Cuba and Banco Nacional are one and the same. . . ." Banco Nacional de Cuba v. First National City Bank of New York, 270 F. Supp. 1004, 1006 (S.D.N.Y. 1967).

2. The original loan was made by First National City to Banco de Desarrollo Economicoy Social (Bandes), a corporate agency of the government of the Republic of Cuba, for fifteen million dollars. After the Castro Government seized control of the Republic of Cuba, the loan was renewed for another year commencing on July 8, 1959. Cuban Law No. 730, February 16, 1960 and Law No. 847, June 30, 1960, dissolved Bandes and declared Banco successor to the rights and obligations thereof, including the obligation to repay the loan. 270 F. Supp. at 1005.

3. When the loan was renegotiated on July 7, 1960, Banco repaid five million dollars and Citibank released approximately one-third of the collateral. Banco Nacional de Cuba v. First National City Bank of New York, 431 F.2d 394, 395 (2d Cir. 1970).

4. Executive Power Resolution No. 2, issued September 17, 1960, left no doubt that the confiscations were permanent. Text reprinted in 270 F. Supp. at 1009 n.6.

5. 376 U.S. 398 (1964).

6. 22 U.S.C. § 2370(e)(2) (1970): "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming

court granted summary judgment for Citibank.[7] On appeal, the Second Circuit Court of Appeals reversed.[8] Citibank petitioned the

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through such a state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

7. "The *Sabbatino* amendment is inapplicable 'in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.' 22 U.S.C. § 2370(e)(2). However, since the Executive Branch has maintained silence for the six years that this action has been pending, it is clear that it has not determined that foreign policy interests of the United States require application of the act of state doctrine here." 270 F. Supp. at 1010 n.8. The nationalization was determined to be in violation of international law. "The totality of circumstances presented by this case—a patent failure to provide adequate compensation, a retaliatory confiscation by a foreign government, and discrimination against the United States nationals—compel a finding that the Cuban decree directing confiscation of First National City's property was in direct contravention of the principles of international law." 270 F. Supp. 1010. Plaintiff did not dispute Citibank's right to the ten million dollars derived from the sale: Banco only contested the retention of the excess.

8. 431 F.2d 394 (2d Cir. 1970). The court held that the Hickenlooper amendment was not applicable in this instance, by indulging in a strained interpretation of congressional intent. Professor Lillich suggests that the interpretation of the legislative history came from Banco's brief. Lillich, *1970 Survey of New York Law: International Law,* 22 SYRACUSE L. REV. 263, 269-80 (1971). The court added that failure to apply the act of state doctrine would run counter to what Congress had intended to be the statutory method of recovery. International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1643 (1970). Pertinent sections of this act are set out below.

§ 1623(h): "The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied . . . shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. . . . The action of the

Supreme Court for a writ of certiorari on October 13, 1970.[9] On November 17, 1970, the Legal Adviser to the State Department sent a letter to the Supreme Court, expressing the opinion of the executive branch that the act of state doctrine should not be applied in this case.[10] The Supreme Court granted certiorari, vacated the decision of

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Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

§ 1643: "It is the purpose of this subchapter to provide for the determination of the amount and validity of claims against the Government of Cuba . . . [arising] out of nationalization, expropriation, intervention, or other takings of, or special measures directed against, property of nationals of the United States . . . arising out of violations of international law by the Government of Cuba . . . in order to obtain information concerning the total amount of such claims against the Government of Cuba . . . on behalf of nationals of the United States. This subchapter shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims."

§ 1643(b)(a): "The Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba . . . arising since January 1, 1959, in the case of claims against the Government of Cuba . . . for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States."

§ 1643(e): "In determining the amount of any claim, the Commission shall deduct all amounts the claimant has received from any source on account of the same loss or losses."

According to the court, it would seem that Congress wanted this type of claim to be submitted to the Foreign Claims Settlement Commission. 431 F.2d at 403. For a hypothetical example of the settlement of a claim through the Foreign Claims Settlement Commission see 431 F.2d at 404 n.18.

9. *Petition for cert. filed,* 39 U.S.L.W. 3230 (U.S. Nov. 24, 1970) (No. 846).

10. Letter from John R. Stevenson to the clerk of the United States Supreme Court, the Honorable E. Robert Seaver, Nov. 17, 1970. 442 F.2d at 536-38. The letter stated in part: "Recent events, in our view, make appropriate a determination by the Department of State that the act of state need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine. . . . The Department of State believes that the act of state doctrine should not be

the Second Circuit, and remanded the case for further consideration.[11] On remand, Citibank contended that the Second Circuit should reverse its prior decision because the executive branch had submitted a "Bernstein letter"[12] which made application of the act of state doctrine unnecessary. The Second Circuit Court of Appeals, *held*, prior decision affirmed.[13] The exception to the act of state doctrine created by the *Bernstein* case should be limited to its own facts, and the State Department's letter of November 17, 1970 did not remove the restraint of the act of state doctrine. *Banco Nacional de Cuba v. First National City Bank of New York*, 442 F.2d 530, *cert, granted*, 40 U.S.L.W. 3161 (U.S. Oct, 12, 1971).

In *Underhill v. Hernandez*,[14] the Supreme Court first enunciated the act of state doctrine. The Court said that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[15] The first direct executive intervention in the application of the act of state doctrine occurred in an attempt to recover property seized by the Nazi Government.[16] Judge Learned Hand, in *Bernstein v. Van Heyghen Freres Societe Anonyme*,[17] applied the act of state doctrine

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applied to bar consideration of a defendant's counterclaim or setoff against the Government of Cuba in this or like cases."

11. The Solicitor General suggested to the Supreme Court that it remand the case to the court of appeals for the court's further consideration in light of the State Department's views. *See* First National City Bank v. Banco Nacional de Cuba, 400 U.S. 1019 (1971). In remanding the case, the Supreme Court noted that it was "expressing no views on the merits of the case." 400 U.S. at 1019.

12. For an explanation of the Bernstein letter, see Bernstein v. N.V. Nederlandsche-Amerikaanche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

13. 431 F.2d 394 (2d Cir. 1970).

14. 168 U.S. 250 (1897). The earliest pronouncement of this doctrine was in Hatch v. Baez, 7 Hun. 596 (N.Y. Sup. Ct. 1876). *See* R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 64-138 (1964). *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§41-43 (1965).

15. 168 U.S. at 252. In Oetjen v. Central Leather Co., 246 U.S. 297 (1917), the Court said: "The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency." 246 U.S. at 303.

16. *See* Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 90 (1968).

17. 163 F.2d 246 (2d. Cir. 1947).

and refused to consider the validity of the Nazi confiscation.[18] In a subsequent case[19] involving the same seizure, however, the court reached the validity of the acts of the Nazi officials and held that the State Department's letter to the court had expressly released it from the restraint of the act of state doctrine,[20] thus giving birth to the so-called "Bernstein exception." Squarely facing the problem of the application of the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court held that the doctrine applied and, therefore, that United States courts were prevented from examining the validity of the acts of the Cuban Government "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles . . . ."[21] The Court avoided passing upon the validity of the "Bernstein exception" since all doubt of executive policy was removed by the amicus briefs of the executive branch in favor of applying the act of state doctrine.[22] Subsequently, Congress passed

18. The court reaffirmed its decision in the first *Bernstein* case, holding that the act of state doctrine prevented judicial determination of the confiscatory acts of the Nazi Government because of the lack of definite expression of executive policy. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d. Cir. 1949).

19. Bernstein v. N.V. Nederlandsche-Americaansche Stoomvaart-Maatshcappij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

20. "3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." Letter from Jack B. Tate, Acting Legal Adviser, to Bennett, House & Couts, April 13, 1949, *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers*, 20 DEP'T STATE BULL. 592, 593 (May 8, 1949).

21. 376 U.S. at 428. The Court reasoned: "[The act of state doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." 376 U.S. at 423.

22. "[R]ather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of the suit . . . even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428.

the Hickenlooper amendment.[23] The effect of the amendment was a reversal of presumptions. Under the *Sabbatino* decision, courts assume that any adjudication on the merits of the act of the foreign state would embarrass the executive in the conduct of foreign policy unless the executive expresses a contrary view. Under the amendment, the courts assume that they may proceed with an adjudication of the validity of the foreign act, unless the President expresses the view that such an adjudication would impede the conduct of foreign policy.[24] Nevertheless, there was a difference of opinion among the proponents of the legislation on the scope of the amendment.[25] On remand of

23. 22 U.S.C. § 2370(e)(2) (1970). The amendment was re-enacted on Sept. 6, 1965, and contained a slight variation from the first Hickenlooper amendment. The only change was the substitution of "other right to property" for "other right" in two instances, and the deletion of Proviso 3, which had made the amendment inapplicable to any proceeding commenced prior to January 1, 1966. "The words 'to property' have been inserted to make it clear that the law does not prevent banks, insurance companies, and other financial institutions from using the act of state doctrine as a defense to multiple liability upon any contract or deposit or insurance policy in any case where such liability has been taken over or expropriated by a foreign state." S. REP. No. 170, 89th Cong., 1st Sess. 19 (1965). For a discussion of the changes in the amended version of the Hickenlooper amendment, see Banco Nacional de Cuba v. Farr, 383 F.2d 166, 171-72 (2d. Cir. 1967).

24. S. REP. No. 1188, 88th Cong., 1st Sess. (1964).

25. One author of the amendment took a broad view of its scope: "... its [the amendment's] purpose is not merely to facilitate the occasional recovery of specific goods or their money equivalent, but rather to restore and confirm a model in principle and procedure...." *Hearings on the Foreign Assistance Act of 1965 Before the House Comm. on Foreign Affairs,* 89th Cong., 1st Sess., at 1035 (1965) (hereinafter cited as *Hearings).* Before the House Committee on Foreign Affairs, Attorney General Katzenbach expressed a more limited view: "We are talking about a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back into the United States." *Id.* at 1235. Senator Hickenlooper himself made contradictory statements regarding the purpose of the amendment. *Compare* 110 CONG. REC. 19546 (1964) (letter of Senator Hickenlooper to the *Washington Post,* July 27, 1964) *and id.* at 24076 *with id.* at 19548. In a letter from Professor Cecil J. Olmstead to Donald M. Fraser, March 29, 1965, Mr. Olmstead posed a hypothetical, qualifying his remarks made at the hearings. "Thus, if Castro sues a U.S. bank whose branch he has seized in Havana for return of certain Cuban Government accounts or collateral held by the U.S. bank, the present U.S. rule (established in the Supreme Court decision in *National City Bank v. Republic of China,* 348 U.S. 356 (1955)) is that by bringing suit Castro has waived sovereign immunity and that the U.S. bank is permitted to make a counterclaim or setoff for the value of its seized Havana branch." *Hearings, supra* note 25, at 1306.

Sabbatino, the Second Circuit, in *Banco Nacional de Cuba v. Farr*,[26] upheld the constitutionality of the Hickenlooper amendment and applied it to the case.[27] The court reached the merits of the claim by Banco and reasoned that since the Cuban law in question was in violation of international law, judgment should be rendered for plaintiff. Furthermore, the court reasoned that because the executive branch had not suggested application of the act of state doctrine, it should not be applied to the case.[28]

The court in the instant case first determined that the State Department's letter of November 17 expressed the view that the act of state doctrine[29] should not be applied to bar consideration of the merits. After an examination of the *Bernstein* case, the court concluded that the "Bernstein exception" should be limited to its own facts.[30] The court reasoned that the circumstances leading to the State Department's letter in the *Bernstein* case were unique. At the

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26. 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, *rehearing denied*, 390 U.S. 1037 (1968). Farr Whitlock received notice on August 23, 1960 that Peter L.F. Sabbatino on August 16 had been appointed temporary receiver for the assets pursuant to N.Y. CIV. PRAC. ACT § 977-b (1963). Sabbatino was eliminated when the parties agreed that the Lehman Brothers would hold a sum of money in escrow to satisfy the final judgment in this case and Sabbatino transferred $225,000 to Lehman Brothers for that purpose. 383 F.2d at 170-71.

27. "[W]e hold that the application of the Hickenlooper amendment to this case does not deprive appellant [Banco] of its property without due process of law under the Fifth Amendment." 383 F.2d at 179. "Thus we find that the adoption of the Hickenlooper Amendment was not legislative interference with judicial power violative of the Federal Constitution; to the contrary, we find good reason for judicial acceptance of this legislative modification of the act of state doctrine." 383 F.2d at 182. The court also rejected the idea that Congress had interfered with the executive power. 383 F.2d at 182. "The existing law [the Hickenlooper amendment] applies to cases pending at the time of its enactment . . . . " S. REP. No. 170, 89th Cong., 1st Sess. 19 (1965).

28. The district court had waited 60 days before entering final judgment to allow the President to exercise his right under the amendment; the court was informed by a letter from the U.S. Attorney for the Southern District of New York on September 25, 1965, that the executive branch had made no determination that the act of state doctrine should be applied. 383 F.2d at 172 n.7.

29. 210 F.2d at 375.

30. The court distinguished the *Bernstein* case on several points. First, in *Bernstein*, the acts of state were performed by the German Government with which the United States currently was at war, and the German Government was no longer in existence when the letter was sent. In the instant case, the United States has never been at war with the Castro Government and, furthermore, recognized that government. Secondly, the "Nazi Government's actions had been

time of the *Bernstein* decision the Nazi Government no longer existed, and a duty to pay reparations had already been imposed; consequently, a suspension of the act of state doctrine would not affect the negotiation of a reparations settlement.[31] Since the court found that the State Department's letter did not bring the instant case within the narrow "Bernstein exception," it concluded that the act of state doctrine barred examination of the validity of the expropriation by the Cuban Government. Justice Hays, dissenting, argued that the "Bernstein exception" was applicable to the instant case. He criticized the majority's reasons for distinguishing *Bernstein*[32] and argued that the court was bound by *Bernstein* unless it decided to overrule it. The dissent concluded that the determination of whether the court would be barred by the act of state was not a judicial function, and should be left to the executive and legislative branches.[33] Hays reasoned that the majority had violated the fundamental purpose of the "Bernstein exception" and had engaged in precisely the kind of judgment that the exception sought to avoid.[34]

Pursuant to the Trading with the Enemy Act,[35] Cuban assets are not allowed to leave the United States. Once the value of such blocked assets has been determined, this amount is submitted to the Foreign Claims Settlement Commission.[36] Consequently, if the judgment for

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condemned throughout the world as crimes against humanity," and the Cuban action had not been similarly condemned. Thirdly, the State Department's letter in the *Bernstein* case indicated that it was United States policy to provide restitution for all victims of Nazi confiscation, but in this case the concern was only with those who asserted counterclaims or setoffs. Fourthly, defendant is "seeking a windfall at the expense of other creditors," while in Bernstein, plaintiff was seeking restitution for his property. And finally, the court reiterated a distinction made in the *Sabbatino* case that the Nazi Government was no longer in existence. 442 F.2d at 538-39. *See also* 431 F.2d at 404 n.18.

31. 442 F. 2d at 534.

32. "Considerations such as the acts of the Nazi government, the fact that we were at war with the government in question, and the fact that that government no longer existed, all used by the majority to distinguish *Bernstein,* were set forth not by the court but by the State Department in its letter." 442 F.2d at 538 (dissenting opinion).

33. "The attitude of the United States toward foreign powers must be left, as in *Bernstein,* to the decision of the other branches of government." 442 F. 2d at 538.

34. 442 F. 2d at 538.

35. 50 U.S.C. App. § 5 (1970).

36. 22 U.S.C. § 1643b(a) (1970); *see generally* R. LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS (1962).

Banco stands, the excess from the sale of the collateral will be turned over to the Commission. The court's decision appears to be based upon two political considerations: this fund might be used either to satisfy at a later time the claims against the Cuban Government on a percentage basis[37] or as leverage to help The United States in negotiations with Cuba as long as the title to the money in this fund rests in the Cuban Government. Whether the court of appeals in this instance applied the act of state doctrine based upon these political considerations, thus encroaching upon the powers left to the executive branch, or adjudicated the case strictly on the merits, is unclear.[38] If the executive resolved these political questions in its letter, it would appear to be error for the court to decline to adjudicate the counterclaim on its merits.[39] Because of the court's first opinion, which had held the Hickenlooper amendment inapplicable, the State Department was forced to write a letter addressing itself to the fact that the court had held that the act of state doctrine barred Citibank's counterclaim, despite the State Department's position that the doctrine should not be applied; thus, the Department was attempting to include the letter in the "Bernstein exception."[40] Since the State Department did not say that application of the act of state doctrine was vital to foreign policy interests, the executive branch must not have been concerned with whether the recovery was to be turned over to the Foreign Claims Settlement Commission. Both decisions of the Second Circuit avoided reaching the merits of Citibank's counterclaim. In the first opinion the court held that the Hickenlooper amendment did not apply.[41] The second opinion held that the case did not come within the "Bernstein exception."[42] These decisions have created two distinct classes of cases, one coming under the Hickenlooper amendment, and the other limited to the property seized by the Nazi Government controlled by the "Bernstein exception." In effect, the Second Circuit has eliminated the "Bernstein exception" by interpreting it so narrowly. The distinction between the two is that under

37. *See* hypothetical example note 12, *supra.*

38. When the court first decided this case, it examined in detail the method in which the recovery would be added to the existing fund and the fact that Citibank could then join with the other American nationals who had property confiscated by Cuba in claiming compensation from the fund. 431 F. 2d at 394.

39. *See* Petitioner's Brief for certiorari at 11.

40. Bernstein v. N.V. Nederlandsche-Americaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

41. 431 F. 2d at 394.

42. 442 F. 2d at 530.

the "exception" the court applies the act of state doctrine absent a communication from the executive branch that it desires an adjudication of the case, but under the amendment, the court does not apply the doctrine unless the executive expresses the view that an adjudication would hinder United States foreign policy interests. In this instance the State Department did not expect an expression of executive policy to be necessary because of the Hickenlooper amendment. The letter did not become necessary until after the Second Circuit had ruled that the Hickenlooper amendment was inapplicable.[43] It appears that Congress was trying to supplement the coverage of the "Bernstein exception" by passing the Hickenlooper amendment. Because of the attitudes taken by the executive branch in its letter of November 17 and the legislative branch in the Hickenlooper amendment, it would be better judicial policy for the court to reach the merits of Citibank's counterclaim, thereby synthesizing the Hickenlooper amendment and the "Bernstein exception" rather than treating the two as completely separate.[44] Such an approach would implement the intent of both the executive and legislative branches and would clarify a body of previously confused law.

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43. Letter, *supra* note 10.

44. If the court cannot correlate the expressions of legislative and executive policies, it should recognize a "fair play" exception similar to that expressed in *National City Bank v. Republic of China,* 348 U.S. 356 (1955). *See* Note, 11 VA. J. INT'L L. 406, 418 (1971). In the *Republic of China* case, the court held that it would be unfair for a foreign sovereign, suing in the courts of the United States, to raise the defense of sovereign immunity to bar a counterclaim. The Republic of China would be liable on contract claims in its own courts, and Americans have the same rights as Chinese in those courts. 348 U.S. 356. *See generally* R. FALK, *supra* note 14, 139-69; *see also* Petitioner's Brief for certiorari, First National City Bank v. Banco Nacional de Cuba.

ADMIRALTY—JURISDICTION—SHIPOWNERS' DUTY OF SEAWORTHINESS DOES NOT EXTEND TO LONGSHOREMAN INJURED ON THE DOCK BY AN INSTRUMENT NOT APPURTENANT TO VESSEL

Respondent, a forklift operator, was injured by the overhead protection rack of his forklift[1] while stage-loading[2] cargo destined for a vessel owned by petitioner.[3] The forklift was owned and controlled by respondent's stevedore employer. Respondent brought an action against the ship and shipowner under the diversity[4] and admiralty[5] jurisdiction of the federal district court. Respondent alleged that petitioner breached his duty of seaworthiness or, alternatively, his duty of due care. Petitioner filed a third-party indemnification claim against the stevedore company.[6] On cross motions for summary judgment on the seaworthiness claim,[7] the district court held for petitioner. The district court found that respondent was not loading the vessel and held that the shipowner owed no duty of seaworthiness to him. The Court of Appeals reversed,[8] found that respondent was engaged in loading the vessel and held that he should be entitled to prove his allegations of unseaworthiness.[9] On writ of certiorari, the

1. The protection rack is a metal frame positioned above the driver's seat to protect him from falling objects. In this case, the overhead protection rack of the forklift came loose and fell on respondent, causing the injuries of which he complained. Respondent's investigation after the accident allegedly revealed that the four bolts which should have secured the rack were missing.

2. Respondent's forklift had picked up a large load of cargo on the dock and was transferring it to a point alongside the vessel where it subsequently was to be hoisted aboard by the ship's own gear.

3. The vessel was the *S.S. Sagamore Hill,* a ship owned and operated by Victory Carriers, Inc., which was loading cargo in Mobile, Alabama. Respondent's employer, Gulf Stevedore Corp., was in charge of the loading operation.

4. 28 U.S.C. § 1332 (1970).

5. 28 U.S.C. § 1333 (1970).

6. A shipowner held liable to a longshoreman for unseaworthiness may bring a third-party action against the stevedore company for indemnity if the longshoreman's injury was occasioned by a breach of the stevedore's warranty to the shipowner of workmanlike performance. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

7. The district court and the court of appeals dealt only with the unseaworthiness claim; the district court did not pass on the question of whether or not the forklift was in fact defective. Law v. Victory Carriers, Inc., 432 F.2d 376, 378 n.2 (5th Cir. 1970).

8. 432 F.2d 376 (5th Cir. 1970).

9. 432 F.2d at 385. The court relied on Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) and Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963). For a

Supreme Court, *held*, reversed. The duty of seaworthiness does not extend to a longshoreman injured on the dock by a defective forklift owned and controlled by his employer. *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971).

The subject matter jurisdiction of the federal courts includes "all Cases of admiralty and maritime Jurisdiction."[10] While federal maritime jurisdiction over contracts is dependent on a subject matter conceptualization of the pendant contract,[11] federal maritime tort jurisdiction is dependent on a spatial conceptualization of the location of the tort.[12] Historically, only those torts consummated on the

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discussion of these decisions see notes 22, 25, 26, & 28 and accompanying text, *infra*.

10. U.S. CONST. art. III, § 2, cl. 1. Congress has implemented this provision, giving the district courts "original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases, all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1970). Under the saving to suitors clause, the respondent in the instant case was entitled to assert his claims under the diversity jurisdiction of the district court, 28 U.S.C. § 1332 (1970), as well as under § 1333 itself. *Cf.* Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 410-11 (1953). Under either section, however, the claim that a ship or its gear was unseaworthy would be rooted in federal maritime law and not state law. Victory Carriers, Inc. v. Law, 404 U.S. 202, 204 (1971).

11. In the leading early case of De Lovio v. Boit, 7 F. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815), Justice Story held that the federal maritime jurisdiction "extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." 7 F. Cas. at 444. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 18-28 (1957).

12. The spatial conceptualization of the location of the tort, upon which federal maritime tort jurisdiction depends, is often referred to as the "locality" test. The locality test is described by Justice Story as follows: "In regard to torts I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." Thomas v. Lane, 23 F. Cas. 957, 960 (No. 13,902)(C.C.D. Me. 1813). *Accord,* Nacirema Operating Co. v. Johnson, 396 U.S. 212, 214-15 (1969); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953); Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52, 59-60 (1914); Martin v. West, 222 U.S. 191, 197 (1911); The Plymouth, 70 U.S. (3 Wall.) 20, 33 (1865); The Commerce, 66 U.S. (1 Black) 574, 579 (1861); Waring v. Clarke, 46 U.S. (5 How.) 441, 463-64 (1847); De Lovio v. Boit, 7 F. Cas. 418, 420 (No. 3,776)(C.C.D. Mass. 1815).

navigable waters were within maritime tort jurisdiction.[13] Piers and docks were early characterized as extensions of the land and not as "navigable water,"[14] and the dividing line was held to be the gangplank.[15] Although the relative roles of state and federal maritime law subsequently became confused on the seaward side of the pier,[16]

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13. Federal maritime tort jurisdiction embraces "every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters . . . ." Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52, 60 (1914).

Historically, torts consummated on land were clearly not within the federal maritime jurisdiction. Rodrique v. Aetna Cas. & Sur. Co., 395 U.S. 352, 360 (1969); T. Smith & Son v. Taylor, 276 U.S. 179 (1928); The Troy, 208 U.S. 321 (1908); The Plymouth, 70 U.S. (3 Wall.) 20 (1865); Hastings v. Mann, 340 F.2d 910 (4th Cir.), *cert. denied,* 380 U.S. 963 (1965). *But cf.* The Raithmoor, 241 U.S. 166 (1916); The Blackheath, 195 U.S. 361 (1904). In *The Blackheath,* a vessel had collided with a lighthouse, causing damage; in both cases, because the structure damaged by the vessel was a structure principally concerned with navigation, maritime tort jurisdiction was upheld, in spite of the fact that the structures were technically extensions of the land. However, it is no longer necessary to worry with the fine distinctions suggested by these cases. *See* note 19 and accompanying text, *infra.*

14. Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., 208 U.S. 316, 320 (1908); Johnson v. Chicago & Pac. Elevator Co., 119 U.S. 388, 397 (1886); *Ex parte* Phenix Ins. Co., 118 U.S. 610, 618-19 (1886); The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1865). In defense of this dividing line and of the exclusive jurisdiction of federal maritime law, the Supreme Court twice rejected congressional efforts to apply state workmen's compensation statutes to shipboard injuries suffered by maritime workers and longshoremen. *See* Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). These congressional attempts were sparked by an earlier Supreme Court decision, Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), which had held unconstitutional a New York state workmen's compensation law as applied to a stevedore injured on the gangplank of a ship.

Accepting these decisions, Congress passed the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §§ 901-50 (1970), providing a system of compensation for longshoremen injured on navigable waters. The Act's coverage was limited, however, to those injuries and deaths "occurring upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. § 903(a) (1970). The Court has interpreted Congress' intent as having anticipated that dockside accidents would remain under the umbrella of state law and state workmen's compensation systems. *See* Nacirema Operating Co. v. Johnson, 396 U.S. 212, 217-19 (1969); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 256-57 (1940).

15. The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1865).

16. This confusion may be traced to the Court's modifying the doctrine of Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), by preserving certain state

shoreward, the line had held fast. The Supreme Court refused to permit recovery in admiralty when the locus [17] of the tort was on "land" even where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks or other shore-based property. [18] Dissatisfied with the results of these decisions, Congress passed the Admiralty Extension Act of 1948. [19] The Act provided that "[t]he 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

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remedies for accidents and deaths occurring on navigable waters. *See* Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962); Davis v. Department of Labor and Indus., 317 U.S. 249 (1942); Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941); Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). All of these cases of overlapping state-federal jurisdiction involved injuries on the seaward side of the *Jensen* line. The Court upheld the power of the states to provide workmen's compensation to longshoremen injured by accidents occurring on the dock, under the theory that since the pier is part of the land, application of state law here would not conflict with the uniform federal maritime law applied on navigable waters. *See* State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922).

In Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969), the Court held that by limiting coverage under § 903 of the Act to accidents occurring "upon navigable waters," Congress had not intended to cover accidents which occurred on piers permanently affixed to the shore: "*Calbeck* made it clear that Congress intended to exercise its full jurisdiction seaward of the *Jensen* line and to cover all injuries on navigable waters, whether or not state compensation was also available in particular situations. . . . But removing uncertainties as to the Act's coverage of injuries occurring on navigable waters is a far cry from construing the Act to reach injuries on land traditionally within the ambit of state compensation acts." 396 U.S. at 220-21.

17. Traditionally, the locus of a tort is the place of injury.

18. Martin v. West, 222 U.S. 191 (1911); The Troy, 208 U.S. 321 (1908); Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., 208 U.S. 316 (1908); The Plymouth, 70 U.S. (3 Wall.) 20 (1865). *But cf.* The Admiral Peoples, 295 U.S. 649 (1935).

19. 46 U.S.C. § 740 (1970). The House Report on the Extension of Admiralty Jurisdiction Act stated that the Act was being passed to remedy the "inequities" of such cases as Martin v. West, 222 U.S. 191 (1911); The Troy, 208 U.S. 321 (1908); and Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co., 208 U.S. 316 (1908); which had held there was no admiralty jurisdiction to provide a remedy for damage done by ships on navigable waters to land structures. H.R. REP. No. 1523, 80th Cong., 2d Sess. (1948), at 2. Congress also passed the Jones Act, 46 U.S.C. § 688 (1970), providing a statutory remedy for members of a ship's crew injured in the course of their employment. The Act covered

on land." [20] The statute survived constitutional attack in the lower federal courts [21] and was applied without question by the Supreme Court in *Gutierrez v. Waterman Steamship Corp.* [22] In *Gutierrez*, the Court permitted recovery on a seaworthiness claim against the shipowner by a longshoreman injured on a dock by defective cargo containers owned by a stevedore company. The containers had been unloaded from a ship located on navigable waters. The doctrine of unseaworthiness, under which the longshoreman in *Gutierrez* recovered, originated in *The Osceola* [23] and has since experienced unremitting growth and expansion.[24] In 1946 the Supreme Court held that the obligation of seaworthiness, traditionally owed by an owner of a ship to seamen, extended to longshoremen injured while doing the ship's work aboard the ship even though they were employed by an independent stevedoring contractor that the owner had hired to load or unload the ship. [25] The Court's rationale for extending the duty of seaworthiness to longshoremen injured on board a vessel was that a worker "doing a seaman's work and incurring a seaman's hazards,"

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crewmen injured ashore as well as aboard and was considered by the Supreme Court to be an extension of the ancient remedy of maintenance and cure which itself was a traditional and important exception to the usual rule that maritime law does not provide remedies for injuries on land. *See* O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). Longshoremen, of course, are not covered by the Jones Act.

20. 46 U.S.C. § 740 (1970).

21. *See* United States v. Matson Navigation Co., 201 F.2d 610, 614-16 (9th Cir. 1953); Fematt v. City of Los Angeles, 196 F. Supp. 89, 93 (S.D. Cal. 1961); American Bridge Co. v. The Gloria O, 98 F. Supp. 71, 73-74 (E.D.N.Y. 1951).

22. 373 U.S. 206 (1963).

23. 189 U.S. 158 (1903). The second of Justice Brown's four propositions in his opinion for the Court was the following: "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." 189 U.S. at 175. Subsequently, the doctrine of unseaworthiness was severed from concepts of negligence in Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

24. In the words of Judge Coleman, "The doctrine is a growing concept, constantly undergoing redefinition as the risks of those protected are enlarged by changing technology and shipboard technique." Dillon v. M.S. Oriental Inventor, 426 F.2d 977, 979 (5th Cir. 1970). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 248-394 (1957); Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers,* 39 CORNELL L.Q. 381 (1954). *See also* Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts,* 76 HARV. L. REV. 819 (1963).

25. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

should be entitled to the seaman's protections "regardless of the fact that he is employed immediately by another than the owner."[26] Subsequently, the Court established that the shipowner's duty of seaworthiness attaches to equipment supplied by the stevedore company.[27] In *Gutierrez*, the Court further extended the applicability of the doctrine of unseaworthiness to longshoremen by applying it to an injury sustained by a longshoreman off the vessel and on the dock.[28] The rationale implicit in the *Gutierrez* opinion was a logical extension of the principle embodied in *Seas Shipping Co. v. Sieracki.*[29] Since a longshoreman loading or unloading a vessel is doing a seaman's work and incurring a seaman's hazards, he should be entitled to the seaman's protections regardless of the fact that he is a few feet landward of the waterline. Post-*Gutierrez* decisions turned, therefore, on a judicial determination of whether the injured longshoreman was engaged in the process of "loading" or "unloading" the vessel.[30] The minority defined "loading" and "unloading" narrowly and mechanically. The cases limited "loading" to those activities which began with the physical act of lifting the

26. 328 U.S. at 99. The Court further noted: "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew .... That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection." 328 U.S. at 96. Accordingly, the Court concluded: "[w]hen a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights." 328 U.S. at 97.

27. Rogers v. United States Lines, 347 U.S. 984 (1954), *rev'g per curiam* 205 F.2d 57 (3rd Cir. 1953); Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954). *See also* Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

28. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963). The injured longshoreman in *Gutierrez* slipped on the dock on beans which had spilled out of defective bags during the unloading of a cargo of beans from the vessel. On the facts the Court concluded that the longshoreman was within the scope of the shipowner's duty of seaworthiness, holding that "[t]he duty to provide a seaworthy ship and gear, including cargo containers, *applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier.*" 373 U.S. at 215 (emphasis added).

29. 328 U.S. 85 (1946).

30. For a discussion of the theory behind the extension of shipowners' duty of seaworthiness to longshoremen engaged in "loading" and "unloading," see note 26 and accompanying text, *supra;* cases cited notes 31 & 32, *infra. See generally* Note, *Risk Distribution and Seaworthiness,* 75 YALE L.J. 1174 (1966).

cargo onto the vessel and "unloading" to those activities which ended with the physical act of lowering the cargo to the dock.[31] The majority defined "loading" and "unloading" in a more pragmatic and less ritualistic sense.[32] While the applicability of the doctrine of unseaworthiness had not been precisely delimited, the doctrine had been extended to longshoremen injured on the dock.[33] Finally, the doctrine had been expanded beyond equipment which was part of the traditional gear of a ship or equipment which was attached to or touching the ship.[34]

In the instant case, the Court noted that *Sieracki* did not call into question the extent of federal admiralty and maritime jurisdiction

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31. *See, e.g.,* Drumgold v. Plovba, 260 F. Supp. 983 (E.D. Va. 1966). The *Drumgold* opinion disposed of two separate actions, one by a longshoreman who contended that he had been injured while loading a vessel, the other by a longshoreman who contended that he had been injured while unloading a vessel. Fearful of the possible logical extensions from an interpretation of "loading" and "unloading" that was not limited to the actual physical act of loading or unloading the vessel, the court applied the narrow definition and rejected the plaintiffs' claims. 260 F. Supp. at 984-85, 986-87. *See also* Daniel v. Skibs A/S Hilda Knudsen, 253 F. Supp. 758 (E.D. Pa.), *aff'd,* 368 F.2d 178 (3d Cir. 1966).

32. *See, e.g.,* Byrd v. American Export Isbrandtsen Lines, Inc., 300 F. Supp. 1207 (E.D. Pa. 1969). As in the instant case, *Byrd* involved an injury to a longshoreman engaged in moving cargo by means of a forklift machine from one point on the dock to another point nearer the vessel. Finding that the plaintiff longshoreman's actions at the time of the accident were direct, necessary steps in the physical transfer of the cargo from the railroad car to the vessel, the court refused to limit the concept of "loading" to the actual physical transfer of the cargo from the dock to the ship, and held that plaintiff was essentially engaged in a loading operation and was using equipment necessary for that purpose. *See also* Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970); Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir. 1964); *cert. denied,* 379 U.S. 913 (1964); Hagans v. Ellerman & Bucknall S.S. Co., 318 F.2d 563 (3d Cir. 1963); Litwinowicz v. Weyerhaeuser S.S. Co., 179 F. Supp. 812 (E.D. Pa. 1959). *Cf.* Olvera v. Michalos, 307 F. Supp. 9 (S.D. Tex. 1968).

The Court of Appeals for the Fifth Circuit in Law v. Victory Carriers, Inc., 432 F.2d 376 (5th Cir. 1970), reversed the decision of the District Court for the Southern District of Alabama which had applied the narrow definition of "loading" and aligned itself with those cases applying the more expansive definition. 432 F.2d at 384-85.

33. *See* note 28 and accompanying text, *supra. See also* cases cited note 31, *supra.*

34. *See* Deffes v. Federal Barge Lines, Inc., 361 F.2d 422 (5th Cir.), *cert. denied,* 385 U.S. 969 (1966).

since the accident there occurred on navigable waters,[35] and that in *Gutierrez* federal admiralty jurisdiction was clearly present since the Admiralty Extension Act "on its face" reached the injury there involved.[36] The instant Court reasoned that the decision in *Gutierrez* turned not upon the "function" the stevedore was performing—*i.e.* whether or not he was engaged in loading or unloading at the time of the injury. Rather, *Gutierrez* held that the injury was caused by an appurtenance of a ship, the defective cargo containers. Therefore, the injury was an "injury, to person . . . caused by a vessel on navigable waters" within the meaning of the Admiralty Extension Act.[37] Applying this rationale, the Court held that respondent's injury was not within the scope of the Act.[38] In reaching its decision, the Court emphasized that affording respondent a maritime cause of action would raise difficult questions concerning the extent to which state law would be displaced or pre-empted. Further, maritime recovery would circumvent state workmen's compensation statutes[39] and raise problems as to standards for and limitations of the applicability of maritime law to accidents on land.[40] While the Court recognized that the hazards of the longshoreman's occupation make him especially deserving of a remedy dispensing with proof of fault,[41] it noted that the longshoreman already has a remedy under state workmen's compensation laws that does not depend on proof of negligence on the part of the employer.[42] The Court was of the opinion that if such laws provide inadequate benefits, it is a problem more appropriate for legislative rather than judicial consideration.[43] Finally, the Court noted that the shipowner's liability for unseaworthiness would merely

35. 404 U.S. at 210.
36. 404 U.S. at 210.
37. 404 U.S. at 210.
38. 404 U.S. at 212-14.
39. 404 U.S. at 215-16.
40. The Court noted the split in the lower courts' attempts to define the concept of "loading" for purposes of determining whether a longshoreman injured on shore can recover on an unseaworthiness claim. *See* cases cited notes 31 & 32, *supra.* The Court said that reliance upon the gangplank as the presumptive boundary of admiralty jurisdiction, except for cases in which a ship's appurtenance causes damage ashore, recognizes the traditional limitations of admiralty jurisdiction, *see* notes 12 & 13 and accompanying text, *supra,* and decreases the arbitrariness and uncertainties surrounding amorphous definitions of "loading." 404 U.S. at 214 n.14.
41. *See* note 45, *infra.*
42. 404 U.S. at 215.
43. 404 U.S. at 215-16.

be shifted to the stevedore company by way of a third-party action for indemnity.[44]

The Court's decisions prior to the instant case have consistently reflected the principle that because the loading and unloading of vessels is abnormally dangerous[45] such risks ought to be placed initially upon the shipowners and ultimately passed on through higher prices to the customers of the shipping industry.[46] In distinguishing

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44. 404 U.S. at 215-16. *See also* Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956).

45. Stevedoring is one of the most hazardous professions in American industry. According to the National Academy of Sciences, National Research Council, Maritime Cargo Transportation Conference Longshore Safety Survey Report 22-23 (1956), hazardous industries have the following accident frequency rates:

Stevedoring	92.3 per million man hours worked.
Logging	74.3 per million man hours worked.
Structural Steel Erection	47.5 per million man hours worked.
Saw and Planing Mills	42.0 per million man hours worked.
General Building	37.0 per million man hours worked.

See also U.S. Dep't of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics 345 (1971); New York Shipping Ass'n, Safety Bureau, Annual Accident (1965). *Cf.* Note, *Risk Distribution and Seaworthiness,* 75 YALE L.J. 1174 (1966).

46. *See* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926); Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914).

In *Sieracki,* which held that longshoremen as well as seamen were entitled to recover under the doctrine of unseaworthiness for injuries sustained aboard ship, this principle was explained: "That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden . . . upon the [ship]owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost. . . ." 328 U.S. at 93-94. "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. [citations omitted]. That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection. . . ." 328 U.S. at 96.

Although some subsequent holdings sustaining the applicability of the doctrine of seaworthiness might alternatively have been grounded in more mechanical

Sieracki and *Gutierrez* the instant decision embraced a very narrow interpretation of the duty of seaworthiness, the effect of which is to abrogate the functional test[47] which has been used consistently since

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rules, the language of even these cases have reflected this broad principle. For example, in Reed v. The Yaka, 373 U.S. 410 (1963), which held that a longshoreman was not deprived by the Longshoremen's and Harborworkers' Act, 33 U.S.C. §§ 901-50 (1970), of his unseaworthiness remedy merely because the shipowner happened also to be his stevedore employer, the Court relied upon the policy expressed in *Sieracki*: "[W]e pointed out several times in the *Sieracki* case, which has been consistently followed since, that a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, *but in the hazards of the work.*" 373 U.S. at 414-15 (emphasis added).

Similarly, the "humanitarian policy," rather than the more mechanical maritime tests, was the starting point in Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967): "When this Court extended the shipowner's liability for unseaworthiness to longshoremen performing seamen's work, Seas Shipping Co. v. Sieracki, 328 U.S. 85—either on board or on the pier, Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, either with the ship's gear or the stevedore's gear, Alaska S.S. Co. v. Petterson, 347 U.S. 396, either as employees of an independent stevedore or as employees of a shipowner *pro hac vice,* Reed v. The Yaka, 373 U.S. 410—we noted that 'the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the "humanitarian policy" of the doctrine of seaworthiness,' *id.* at 413, should prevent the shipowner from delegating, shifting, or escaping his duty by using the men or gear of others to perform the ship's work." 386 U.S. at 728.

Even if, as the Court's majority in the instant case noted, the shipowner's liability for unseaworthiness is merely shifted to the stevedore company by way of a third-party action for indemnity, effectively circumventing the state's own arrangements for compensating industrial accidents, strong policy considerations still militate in favor of the arrangement. For example, one significant result of the *Ryan* indemnity doctrine in cases involving land-based injuries was noted recently by the Ninth Circuit in Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970): "Although the landward extension of unseaworthiness has been criticized [citations omitted], the overall result has not been unfortunate. Liability is generally shifted back to the stevedoring company through indemnity suits, and that company then has an incentive to improve its loading and unloading equipment." 425 F.2d at 1312. *See also* Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964). *See generally,* Proudfoot, *"The Tar Baby": Maritime Personal-Injury Indemnity Actions,* 20 STAN. L. REV. 423, 445-46 (1968).

47. The instant Court's reasoning that the decision in *Gutierrez* turned not upon the "function" the stevedore was performing, *i.e.* whether or not he was engaged in loading or unloading, at the time of the injury but rather upon the fact

Gutierrez[48] to determine the extent of the shipowner's duty of seaworthiness. The instant decision, therefore, marks a significant departure from the policy of distributing the risks of personal injury of loading and unloading to the users of the shipping industry. Under the holding in the instant case the only remedy available to a longshoreman injured ashore during loading or unloading by pier-based equipment of the stevedoring contractor is under the state workmen's compensation laws.[49] The Court's deference to Congress in such a situation is a novel posture.[50] Morever, while Congress may be better equipped for precision analysis than a judicial forum, most courts are aware that state workmen's compensation statutes provide diminutive benefits compared to jury determinations of personal injuries,[51] and admiralty courts' evaluations of maritime injuries.[52] Additionally, the theory of limited recovery under state workmen's compensation laws is to offset the imposition of employer

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that his injury was caused by an appurtenance of a ship effectively limits future considerations of the applicability of the doctrine of seaworthiness to dock-side accidents to a consideration of whether the instrument causing the injury is an appurtenance of the ship being loaded or unloaded.

48. *See* cases cited notes 31 & 32 and accompanying text, *supra*. *See also* Spann v. Lauritzen, 344 F.2d 204 (3d Cir. 1965); Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir. 1964); *cf.* Chagois v. Lykes Bros. S.S. Co., 432 F.2d 388 (5th Cir. 1970).

49. 404 U.S. at 223 (dissenting opinion of Justice Douglas). *See also* Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

50. The Court has not deferred to Congress in prior instances approving longshoremen's recoveries when the Harborworkers' Act or state compensation schemes were alternatively applicable. *See* Reed v. The Yaka, 373 U.S. 410 (1963); Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1954); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926); Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914).

Furthermore, Justice Douglas, in his dissenting opinion in the instant case, pointed out that the majority of the instant Court suggested no reason why deference was needed in the circumstances of the instant case and observed further: "[R]eferring a litigant to Congress is normally appropriate where the Court is reluctant to accept his invitation to upset an established rule. Inasmuch as the *Sieracki-Petterson-Gutierrez* principle would appear to be the controlling precedent, the appropriate referral to the legislative process ought to be [by] *Victory Carriers* [petitioner-shipowner], not *Law* [respondent-longshoreman]." 404 U.S. at 224 (dissenting opinion of Justice Douglas).

51. *See* W. PROSSER, THE LAW OF TORTS 555 (3d ed. 1964).

52. *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 248-394 (1957).

liability regardless of fault. The applicability of this theory to factual situations such as in the instant case is not in keeping with admiralty courts' traditional solicitude for those injured in the maritime trade.[53] Furthermore, the problems that affording respondent a maritime cause of action would raise on the standards for and limitations of the applicability of maritime law to other accidents on land have not significantly concerned the Court in the recent past.[54] The obvious effect of the instant decision is to refuse to many longshoremen an appropriate and more favorable remedy.[55] Certainly, the nature of the longshoreman's occupation demands a means of compensation for his injuries that more accurately reflects the hazards of his profession. The jurisprudential ramifications of the instant decision, however, are even more significant. First, in a sweeping decision, the Court has given effect to state workmen's compensation at the expense of federal maritime law; secondly, the Court has revitalized the gangplank as the basis of choice of law; and, finally, the Court has limited the scope of the seaworthiness cause of action to injuries arising within the traditional scope of maritime jurisdiction as extended by a very narrow interpretation of the Admiralty Extension Act.

Steven M. Lucas

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53. *See* Dixon v. The Cyrus, 7 F. Cas. 755 (No. 3, 930)(Pa. 1789). *See also* Peterson v. The Chandos, 4 F. 645 (Ore. 1880). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 248-394 (1957).

54. Such problems were easily brushed aside in *Gutierrez,* in which "[v]arious far-fetched hypotheticals [were] raised, such as a suit in admiralty for an ordinary automobile accident involving a ship's officer on ship business in port, or for someone's slipping on beans that continue to leak from [defective cargo] bags . . . in Denver." The Court concluded: "We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U.S.C. § 740 when . . . it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act." 373 U.S. at 210.

Moreover, Justice Douglas, in his dissenting opinion in the instant case, added: "[i]f a bright-line test is desirable, then the *Sieracki* policy would be less offended by a bright-line drawn around both the ship and the dock than by a line cast only about the vessel. Statistical evidence suggests that the great bulk of high-risk maritime activity occurs on the ship and the adjoining pier." 404 U.S. at 224-25 (dissenting opinion of Justice Douglas). *See also* Law v. Victory Carriers, Inc, 432 F.2d 376, 380-83 (5th Cir. 1970).

55. *See* note 45, *supra.*

ANTITRUST—E.E.C. TREATY—ACQUISITION AND MERGER OF ENTERPRISE BY FIRM HOLDING A DOMINANT POSITION WITHIN COMMON MARKET WITH EFFECT OF ELIMINATING ACTUAL OR POTENTIAL COMPETITION IN A SUBSTANTIAL PART OF THE COMMUNITY VIOLATES ARTICLE 86 OF THE E.E.C. TREATY

A proceeding was initiated under Article 86[1] of the European Economic Community (E.E.C.) Treaty by the Commission of the European Communities (Commission) to determine whether Continental Can Company, Inc. (Continental), U.S.A., had violated the competition rules of the E.E.C. by its acquisition of Thomassen & Drijver-Verblifa NV (T.D.V.), a Dutch packaging firm, and the subsequent merger of T.D.V. with Schmalback-Lubeca-Werke AG (S.L.W.), a German packaging producer controlled by Continental. Acting through a holding company incorporated in the United States, Europemballage Corporation (Europemballage), Continental acquired 91 per cent interest in T.D.V. after having contributed previously its 85 per cent interest in S.L.W. to the same holding company. Europemballage thus brought together the largest producer of light metal containers in continental Europe, S.L.W., and the largest manufacturer of metal containers in the Benelux countries, T.D.V. The Commission's challenge of the legality of this corporate arrangement on grounds that it eliminated competition was met by

1. While there is no official English translation of the E.E.C. Treaty, the British Foreign Office translation, published by Her Majesty's Stationery Office, is a widely accepted version. The following is the text of article 86 from this translation:

> Any improper exploitation by one or more undertakings of a dominant position within the Common Market or within a substantial part of it shall be deemed to be incompatible with the Common Market and shall be prohibited, in so far as trade between Member states could be affected by it.
>
> The following practices, in particular, shall be deemed to amount to improper exploitation:
>
> (a) the direct or indirect imposition of any unfair purchase or selling prices or of any other unfair trading conditions;
>
> (b) the limitation of production, markets or technical development to the prejudice of consumers;
>
> (c) the application of unequal conditions to parties undertaking equivalent engagements in commercial transactions, thereby placing them at a commercial disadvantage;
>
> (d) making the conclusion of a contract subject to the acceptance by the other party to the contract of additional obligations which by their nature or according to commercial practice have no connection with the subject of such contract.

Continental's denial that T.D.V. and S.L.W. shared the same geographical markets. In addition, Continental attacked the Commission's reliance on article 86 as an anti-merger provision and contended that the measure was intended to prevent companies from abusing existing market positions rather than to block mergers.[2] In an original Commission proceeding, *held*, Continental violated article 86 and therefore must submit proposals to the Commission for the termination of this violation.[3] Where an enterprise that holds a dominant position within the Common Market strengthens its position through the purchase of a competitor and thereby virtually eliminates actual or potential competition for that product line in a substantial part of the Common Market, such merger is an abuse of the dominant position in violation of article 86 and must therefore be terminated. *EEC Comm'n v. Continental Can Co.*, 8 E.E.C. J.O. 25 (1972).[4]

Prior to the instant decision, there was widespread doubt that article 86 of the E.E.C. Treaty could be used to prohibit anti-competitive mergers and acquisitions.[5] In fact, the prohibition of monopolistic mergers within the Common Market cannot be found in explicit terms but must be implied from the article 86 denunciation of any abusive exploitation of a dominant position.[6] Until recently, this absence of statutory prohibition and the inclination of the Commission to proceed cautiously in order to observe and identify unique Community market structure problems probably contributed to the restraint in active regulation of mergers within the E.E.C. Furthermore, during its formative years, the E.E.C. desired the rapid economic expansion inherent in corporate acquisitions and mergers. Nevertheless, the

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

3. The decision of the Commission was appealed in February, 1972, to the Court of Justice of the European Communities in Luxembourg. Continental has also submitted to the Commission a formal proposal of settlement in which it offered to divest itself of some of its manufacturing facilities.

4. For an unofficial English translation see 2 CCH COMM. MK'T REP. ¶9481 (1972).

5. *See, e.g.*, C. OBERDORFER, A. GLEISS, M. HIRSCH, COMMON MARKET CARTEL LAW (2d ed. 1971). *See also* R. JOLIET, MONOPOLIZATION AND ABUSE OF DOMINANT POSITION (1970); Markert, *Antitrust Aspects of Mergers in the E.E.C.*, 5 TEXAS INT'L L.F. 32, 46 (1969).

6. In sharp contrast, the Federal Trade Commission, the Justice Department and case precedent provide definitive criteria by which mergers in the United States may be tailored for compliance.

Commission has been quietly laying the groundwork for the application of article 86. One critical element of this foundation was the pronouncement of the basic criteria for the determination of an unlawful merger. This determination is pitched on a three-pronged analysis: first, whether the acquiring or acquired enterprise occupies a dominant position in a substantial part of the Community; secondly, whether there has been abusive exploitation of that position by virtue of the merger; and finally, whether there is a possibility of adverse effects upon trade among the member states of the E.E.C.[7] All of these conditions must be found to exist to constitute a violation.[8] While the term "dominant position" is not defined in article 86, the Commission has interpreted it to mean the existence of "primarily an economic power, namely the capability of exerting an influence on the market that is substantial and in principle foreseeable for the domineering enterprise."[9] In short, enterprises are deemed to hold a dominant position when they can take independent courses of action without consideration of competitors, buyers or suppliers because of market shares or a combination of market shares and an access to ecnomic, financial and technical resources. Any consideration of a firm's dominant position must include a thorough examination of the relevant markets of the acquiring and the acquired firms.

The firms must both occupy the same product and geographical markets and one must hold a dominant position in these markets before article 86 will apply.[10] Abusive exploitation is found when a merger excludes or eliminates competition.[11] While a merger may exclude competition but not violate article 86 if there is no dominant position involved, the closer the enterprise approaches monopolistic status the greater is the likelihood that its position will become abusive. Both market behavior and market structure seem to be the

7. *See Mémorandum de la Commission de la Communauté Economique Européenne sur la concentration des enterprises dans le marché common,* DOC. SEC (65) 3500 (Dec. 1, 1965). For an English translation see *Concentration of Enterprises in the Common Market: Memorandum of the Commission of the European Economic Community to the Governments of the Member States,* CCH COMM. MK'T REP. No. 26 (1966).

8. *Id.*

9. *Id.*

10. The product market is defined by functional interchangeability, *i.e.* all products that may be reasonably employed for the same purpose. The geographical market is confined to the Common Market boundaries and must constitute a substantial part of the Common Market. For a discussion of the relevant market in article 86 applications, see sources cited note 5 *supra.*

11. *See* sources cited note 7 *supra.*

target of the law. Finally, there is the requirement that the abuse must be likely to adversely affect trade between member states of the Common Market. Thus, if the merger affects trade in only a single E.E.C. country or only outside the E.E.C., article 86 may not apply. The Commission has indicated, however, that if one of the enterprises occupies a dominant position in a substantial part of the Common Market, the abuse will be presumed to impair interstate trade regardless of this more specific requirement.[12]

In the instant proceeding, the Commission found that Continental, through its German subsidiary, S.L.W., held a dominant position in the German market for light containers by virtue of both market shares and the group's access to raw materials, capital and technical resources.[13] Moreover, since T.D.V. also occupied the light container market and the same geographical market sphere influenced by S.L.W. activities,[14] the acquisition of T.D.V. expanded Continental's already dominant status by eliminating competition in a substantial part of the Common Market and by reinforcing Continental's financial, economic and technical capacity. Therefore, the acquisition constituted an abuse of Continental's dominant position. Furthermore, because T.D.V. and S.L.W. had been capable of competing with each other in Germany and in the Benelux countries, the Commission found that the merger's foreclosure of this possibility could impair the flow of trade between member states of the E.E.C. The Commission therefore concluded that the prerequisites for a violation of article 86 had been satisfied.

The instant decision is one of first impression for the Commission. Before this decision, the E.E.C.'s market structure objectives had been only vaguely articulated: first, there should be a sufficient number of enterprises to insure effective competition; and secondly, these enterprises should be large enough to cope with problems of research, production and marketing.[15] Article 86 of the E.E.C. Treaty provided little guidance because it did not address the subject in explicit language. Thus, both law and policy produced an environment

12. *Id.*

13. In particular, the Commission cited Continental's manufacture of machinery used in the canning process, its patents and technical know-how and its access to the international capital markets as factors which contributed to its subsidiary's (S.L.W.) domination of the market.

14. S.L.W. and T.D.V. each competed indirectly through subsidiaries in the home territory of the other.

15. E. Sassen, *Ensuring Fair Competition in the European Community*, 35 COMMUNITY TOPICS (1970).

conducive to foreign corporate mergers and acquisitions within the Community. Accordingly, these proliferated rapidly. With the instant decision, the Commission has established a concrete anti-monopoly precedent by which foreign corporate investors may gauge with more certainty their plans for expansion and by which E.E.C. enterprises may at least roughly channel their growth. The effects of this pronouncement upon future E.E.C. market structure are not yet apparent, but a review of United States' anti-merger law experiences may yield valuable insight into the problems that the Community may soon confront. Until the 1950 amendment, section 7 of the Clayton Act[16] had minimal effects on U.S. mergers. As a result, concentrations and oligopolies abound in U.S. business today. However, with the passage of the 1950 amendment and stronger judicial application, more effective control has been asserted over both horizontal and vertical mergers. Unfortunately, unexpected side effects have surfaced. The overwhelming success of the post-1950 Clayton Act often has discouraged attempts at "borderline" mergers that could have been beneficial to competition. Furthermore, this successful enforcement has spawned the conglomerate merger, which, until recently, was immune from close scrutiny because it did not involve problems of competition between the merging firms or of vertical relationships.[17] Responding to the threat of the conglomerates' massing of economic power into a few hands, government has recently challenged several such acquisitions. The E.E.C. could profit from a study of anti-monopoly experiences not only in the United States, but also in other industrialized countries such as Japan, England and its own member states of the Community. From such a study it could knowledgeably extend the principle of the instant decision to shape a comprehensive plan for proper corporate expansion.[18] Another facet of market policing is the effect it may have on transnational business relationships. Perhaps purposefully, the Commission did not distinguish between domestic mergers and mergers involving foreign enterprises. This vagueness leaves the Commission wide discretion in applying

16. For an excellent discussion of the Clayton Act and an illustration of its application to anti-competitive mergers see *The Energy Crisis: The Need for Antitrust Action and Federal Regulation,* 24 VAND. L. REV. 741 (1971).

17. According to the Federal Trade Commission, conglomerate mergers accounted for almost 90 per cent of the total assets involved in large acquisitions in 1968. FTC STAFF REPORT, ECONOMIC REPORT ON CORPORATE MERGERS (1969).

18. *See* Rahl, *Competition and Antitrust in American Economic Policy: Are There Useful Lessons for Europe?,* 8 C.M.L. REV. 284 (1971); Canellos and Silber, *Concentration in the Common Market,* 7 C.M.L. REV. 5 (1970).

article 86. A harsh anti-merger policy directed toward foreign firms would be likely to cause them to enter the E.E.C. through internal expansion rather than by acquisition, thus denying Community enterprises access to foreign capital and technical advancements.[19] This could be especially damaging to the E.E.C. at its present stage of rapid expansion and could stimulate the adoption of protectionist policies throughout the international business community. In contrast, a non-discriminatory policy applying to foreign and domestic firms alike could defeat the very integration of European enterprises that Common Market policies are designed to encourage.[20] While this integration is necessary for effective competition in international trade, it could produce oligopolies and their attendant problems within the E.E.C. domestic market. Thus, both domestic and foreign trade requirements should be examined before selecting corporate targets for anti-monopoly regulation. With this decision, the Commission has embarked on a treacherous voyage through the vaguely charted waters of corporate market regulation. Nonetheless, by thoughtful study of various national anti-monopoly experiences and through careful definition of its objectives for an ideal market structure, the Community can avoid the deleterious effects of over-regulation or under-regulation and thereby enhance the early realization of its primary goal: a single market throughout the European Community.[21]

John D. Arterberry

19. Recent articles in business magazines have discussed the possible transnational business effects of the E.E.C. antimerger action against Continental. *See, e.g.*, 98 DUN'S, No. 6, at 61-65 (1971); BUSINESS WEEK, Dec. 18, 1971, at 37-40.

20. *See* THE EUROPEAN COMMON MARKET ANTITRUST PROJECT OF THE SPECIAL COMMITTEE ON THE EUROPEAN COMMON MARKET ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 4 BUSINESS REGULATION IN THE COMMON MARKET NATIONS 175-81 (J. Rahl ed. 1970).

21. *See, e.g.*, Maier, Book Review, 20 AM. J. COMP. L. 150 (1972).

ANTITRUST—STANDING—FOREIGN NATION HAS STANDING TO SUE FOR TREBLE DAMAGES

Plaintiff,[1] a foreign nation, brought a private antitrust action against a corporate defendant[2] to recover treble damages for defendant's alleged price fixing in the sale of antibiotics to plaintiff.[3] In a pretrial proceeding, defendant moved to dismiss on the grounds that the plaintiff—a foreign nation—was not a "person" within the meaning of antitrust law entitled to bring a treble damage action.[4] The District Court for the Southern District of New York, *held*, motion denied. A foreign nation is a "person" under § 4 of the Clayton Act[5] and is entitled to bring a private antitrust action for treble damages. *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971).

The definition of "person" under the Clayton Act "include[s] corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."[6] The legislative history of the Sherman and Clayton Acts, however, does not reveal whether Congress intended that a foreign nation, per se, be included within the scope of this definition. In *United States v. Cooper Corp.*, the Supreme Court held that the United States was not a "person" entitled to sue for treble damages under the Clayton Act.[7] The Court ruled that in the common, ordinary and natural sense the term "person" does not include the United States.[8] In *Georgia v. Evans*, the

1. Plaintiff is the State of Kuwait. The United States maintains diplomatic relations with this small Arabic country whose oil reserves are estimated to be 15% of the world's supply. THE 1972 WORLD ALMANAC 554 (1971). It is noteworthy that the United States filed an amicus curiae brief in behalf of plaintiff.

2. Charles Pfizer & Company.

3. 15 U.S.C. § 15 (1970) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

4. 15 U.S.C. §§ 7, 12 (1970).

5. 15 U.S.C. § 15 (1970).

6. 15 U.S.C. § 12 (1970).

7. 312 U.S. 600 (1941).

8. The *Cooper* opinion set forth the following guidelines for determining what was meant by "person": "[T]he [d]ecision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of

Supreme Court held that a state of the United States is a "person" entitled to the Clayton Act's treble damages.[9] In the *Evans* decision, Justice Frankfurter distinguished *Cooper* on grounds that the considerations on which *Cooper* was decided were entirely lacking in *Evans*,[10] that the state was otherwise without redress for antitrust violations against it, and that Congress would have had no reason to deprive a state of the United States the civil remedy of treble damages. In recent decisions the Court had voiced strong support for the continuing vitality of a private cause of action for treble damages in order to help in the enforcement of United States antitrust laws.[11]

The court in the instant case perceived that the real issue was whether the maintenance of this action was essential to the effective enforcement of the antitrust laws. In deciding that the standing of a

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construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other aids to construction. But it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." 312 U.S. at 605. Justice Black, in his dissenting opinion, stressed the policy aspects of the decision and criticized the Court's strict construction of a remedial statute. In 1955 Congress partially relieved this situation by permitting the United States to sue for actual damages when injured in its business or property due to an antitrust violation. 15 U.S.C. § 15(a) (1970).

9. 316 U.S. 159 (1942).

10. "The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law. Nor can it seize property transported in defiance of it." 316 U.S. at 162.

11. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968). More recently, however, the Court has carved out from the possible treble damage actions those brought by a state of the United States for injury to its general economy under the theory of *parens patriae*. Hawaii v. Standard Oil Co. of California, 40 U.S.L.W. 4246 (U.S. March 1, 1972), *aff'g* 431 F.2d 1282 (9th Cir. 1970), *rev'g* 301 F. Supp. 982 (D. Hawaii 1969). The Court held that § 4 of the Clayton Act does not authorize a state to sue for treble damages for an injury to its general economy allegedly attributable to a violation of the antitrust laws. Justice Marshall, in delivering the opinion of the Court, reaffirmed the need to encourage potential litigants to serve as "private attorneys-general" to maintain the strong competitive atmosphere required by a healthy and vigorous free enterprise system. Justice Douglas, dissenting, chided the decision as being "a miserly approach to the fashioning of federal remedies . . ." and agreed with Justice Brennan that the otherwise controlling case of Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) should not be distinguished on a mere technicality. *Id.* at 4251.

foreign nation to sue for treble damages was essential, the court emphasized that the treble damage provision was intended to encourage private enforcement of antitrust legislation.[12] In addition, the court regarded the grant of the protections of our antitrust laws to foreign nations as good foreign policy.[13] Following the reasoning of Justice Black in his *Cooper* dissent, the court noted that Congress would not have wanted to deprive a foreign nation of such right of action. The court recognized that even in foreign markets unchecked antitrust violations such as price fixing have adverse effects on domestic competition: excessive profits in foreign sales build up the strength of a domestic operation and thereby create an unfair advantage over domestic competitors. In its order denying the defendant's motion to dismiss, the court stated that there was a substantial ground for difference of opinion on the controlling question of law in this case, and therefore suggested an immediate appeal, as provided by statute.[14]

The court's opinion was unexpectedly brief in its treatment of such an important decision on an issue of first impression.[15] Despite its brevity, the decision of the court was sound. The instant case is distinguishable from *Cooper* and properly follows the policy consideration approach of *Evans*. The United States does not need a

12. *E.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

13. A principle of comity in both international law and American constitutional law is the privilege of a recognized foreign nation to sue in the courts of another nation. U.S. CONST. art. III, § 2 provides that "The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

14. 28 U.S.C. § 1292(b) (1970) provides: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge . . . shall so order."

15. Several factors contributed to the brevity of the opinion. First, there was a definite lack of primary authority on the issue involved. The parties stipulated that the only cases relevant to the decision were *Cooper* and *Evans*. Secondly, the instant case had been grouped with other actions into coordinated pretrial proceedings. Thirdly, the court stated explicitly that it was anticipated that the case would be appealed.

treble damage remedy because other remedies, which include single damages, criminal prosecution, seizure of property and injunction, are at its disposal. The United States does not need the encouragement of treble damages to bring suit because it has available the necessary resources and talent to decrease the risk of losing an antitrust action. Foreign nations, unlike the United States, need the incentive of treble damages to bring private antitrust litigation because they lack the inherent expertise in American antitrust law and would be bringing a costly suit away from home. A foreign nation would have no remedy in United States' courts other than treble damages for injury to its business or property. Denial of a legal remedy in the United States could force a foreign nation to consider other remedies that would be against the interests of the United States, such as confiscation of the company's assets. Like states of the United States, foreign nations are not expressly named as "persons" who can maintain treble damage suits. Since the Supreme Court has recognized, however, that it is consonant with the policy and intent of the antitrust laws for states of the United States to sue for treble damages, this same reasoning should be recognized when the suit is brought by foreign nations. Moreover, Congress explicitly provided that foreign corporations have standing to sue for treble damages.[16] Furthermore, foreign corporations wholly owned by a foreign government also have standing to sue.[17] Since there is no material difference between foreign corporations owned by foreign governments and the foreign governments themselves being allowed to sue for treble damages, the latter should be granted standing.

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16. 15 U.S.C. § 12 (1970).

17. *See In re* Antibiotic Antitrust Actions, 333 F. Supp. 315, 316 n.3 (S.D.N.Y. 1971).

CONSTITUTIONAL LAW—ALIENS—STATE LAW OF INTESTATE SUCCESSION WHICH DISCRIMINATES ON THE BASIS OF NON-RESIDENT ALIENAGE NEITHER INVADES THE FOREIGN RELATIONS POWER NOR VIOLATES THE FOURTEENTH AMENDMENT

Claimants,[1] citizen-residents of the U.S.S.R., sought their proportionate share of a decedent's estate[2] in an heirship proceeding. Claimants' interest became known when they allegedly "appeared and demanded" at a time in excess of five years from the alleged intestate's death. The trial court found that the claimants had not sufficiently proved their relation to the intestate. The court of appeals reversed and remanded the case on the grounds of judicial error.[3] On remand, claimants contended that section 1026 of the California Probate Code[4] unconstitutionally invaded the federal foreign relations power and violated the fourteenth amendment.[5] The state argued that the statute was constitutional, notwithstanding its provision that a non-resident alien must "appear and demand" his interest in an estate within five years from the date of death, although all other persons are allowed five years from the decree of distribution. The trial court found for the claimants. The court of appeals reversed.[6] The Supreme

1. U.A. Gumen, E.A. Lavrik, A.I. Petlevany, and V.I. Vinichenko.

2. John Horman died intestate on December 25, 1961, leaving an estate of over $450,000. Twenty-four persons asserted an interest in the estate.

3. *In re* Estate of Horman, 265 Cal. App. 2d 796, 71 Cal. Rptr. 780 (Ct. App. 1968).

4. CAL. PROB. CODE § 1026 (West 1956) provides that "[a] nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property."

5. Additionally, claimants contended that the statute should be tolled under CAL. CIV. PROC. CODE § 583 (West 1956) which provides that a statute may be tolled where there is legal or physical impossibility or futility in commencing an action. Claimants urged that it would have been futile for them to have brought an action in California until August 2, 1966; therefore, the statute should be tolled until that time. The claimants argued that they "appeared and demanded" on March 17, 1967, within the five year period not counting the time while the statute was tolled. There had been a decision in effect from September 12, 1961, until August 2, 1966, which held that reciprocal rights of inheritance did not exist between the U.S.S.R. and the United States. Estate of Gogabashvele, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (Ct. App. 1961). *Gogabashvele*'s decision was disapproved on August 2, 1966, by *In re* Estate of Larkin, 65 Cal. 2d 60, 416 P.2d 473, 52 Cal. Rptr. 441 (1966).

6. *In re* Estate of Horman, 11 Cal. App. 3d 1165, 90 Cal. Rptr. 439 (Ct. App. 1970).

Court of California, *held*, affirmed. A state law of intestate succession that limits the timeliness of a claim on the basis of the non-resident alienage of the claimant does not invade federal foreign relations power or violate the equal protection or due process provisions of the fourteenth amendment. *In re Estate of Horman*, 5 Cal. 3d 62, 485 P.2d 785, 95 Cal. Rptr. 433 (1971).

A consideration of whether a state statute involving inheritance rights of non-resident aliens invades the federal foreign relations power manifests two conflicting principles of law: although the states have the sole power to regulate inheritance standards,[7] the federal government has the exclusive power to conduct foreign relations.[8] A constitutional clash has occurred between these two principles as a result of several forms of state action. Several states have enacted probate statutes with specific standards for non-resident aliens. In construing these statutes numerous state probate courts have extrajudicially commented upon the relative merits of foreign judicial and political processes.[9] In the leading case of *Clark v. Allen*, [10] the United States Supreme Court held that a California statute concerning non-resident alien inheritance rights and containing a general reciprocity clause did not on its face unconstitutionally intrude into the federal domain. A similar statute of the state of Oregon, however, was held unconstitutional in *Zschernig v. Miller*. [11] The court expressly declined to overrule *Clark*, distinguishing *Zschernig* on the grounds that the Oregon statute had more than an "incidental or indirect effect" [12] on foreign affairs because of its manner of

7. *See In re* Estate of Larkin, 65 Cal. 2d 60, 416 P.2d 473, 52 Cal. Rptr. 441 (1966).

8. Zschernig v. Miller, 389 U.S. 429 (1968). Concerning the federal government's domination of foreign affairs, *see* United States v. Pink, 315 U.S. 203, 229-30 (1941); Hines v. Davidowitz, 312 U.S. 52, 63 (1940) (indicating that the federal government must be entirely free from local interference). *But cf.*, Zschernig v. Miller, *supra* at 433 (a state court may properly perform its function of applying the laws of foreign nations although there is a remote possibility that an opinion may "disturb a foreign nation").

9. *See* Belemeich Estate, 411 Pa. 506, 508-11, 192 A.2d 740, 741-43 (1963). *See also* Zschernig v. Miller, 389 U.S. 429, 433-34 (1968); Heyman, *The Non-resident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 Nw. U.L. REV. 221, 234 (1957).

10. 331 U.S. 503 (1947).

11. 389 U.S. 429 (1968). *See, e.g.*, Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 139-41 (1971).

12. Clark v. Allen, 331 U.S. 503, 517 (1947). *See, e.g.*, Maier, *supra* note 11, at 138 for a complete discussion of the *Clark* test.

application.[13] Recent cases continue to employ the *Clark* test of incidental or indirect effect.[14] While the due process clause of the fourteenth amendment applies to "any person,"[15] it is unclear whether a non-resident alien with property[16] in the United States is entitled to the due process protections.[17] Assuming that a non-resident alien with a property interest within the United States is protected by the due process clause, the question remains whether the property interest that a non-resident alien has in a decedent's estate prior to "appearing and demanding" is "property"[18] within the meaning of the due process clause. Although the Supreme Court has not directly dealt with this question, in *Russian Volunteer Fleet v. United States*,[19] the Court considered a non-resident alien's claim that was based upon a contract to build ships. The Court held that the contractual claim was "property" protected by the due process clause of the fifth amendment.[20] Moreover, while the equal protection

13. *Cf.* Snouffer, *Nonresident Alien Inheritance Statutes and Foreign Policy—A Conflict?*, 47 ORE. L. REV. 390 (1968) (criticizes the *Zschernig* decision).

14. *E.g.*, Shames v. State, 323 F. Supp. 1321 (N.D. Neb. 1971). *See also* Maier, *supra* note 11, at 141-51.

15. The fourteenth amendment to the Constitution provides, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

16. The meaning of "property" in the due process clause "has been defined to include every interest anyone may have in any and everything that is the subject of ownership by man . . . ." Father Basil's Lodge v. City of Chicago, 393 Ill. 246, 256, 65 N.E.2d 805, 812 (1946).

17. Cermeno-Cerna v. Farrell, 291 F. Supp. 521, 528 (S.D. Cal. 1968) (citing Galvan v. Press, 347 U.S. 522 (1954), the district court stated that aliens outside the United States cannot complain of a lack of due process or equal protection of the law); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931); Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 111 (2d Cir. 1966) (holding that non-resident aliens owning property in the United States are entitled to the protection of the fifth amendment's due process guarantees).

18. California law allows property to pass to a non-resident alien heir only if the alien appears and demands his interest therein. Such an estate is subject to the condition subsequent that upon the failure to make such an appearance, the property vests in the state. *In re* Pendergast's Estate, 143 Cal. 135, 76 P. 962 (1904).

19. 282 U.S. 481 (1931).

20. The *Russian Volunteer Fleet* decision is persuasive authority for the proposition that a non-resident alien with property in the United States is entitled to the fourteenth amendment's due process guarantee assuming that the definition

clause protects resident aliens,[21] the precise meaning of the phrase "any person within its jurisdiction" has not been conclusively determined by the Supreme Court.[22] Whether the Court perceives any difference between the fourteenth amendment's due process clause and equal protection clause in terms of the class of persons protected by them is unclear. This problem is compounded by the tendency of courts to speak of "aliens" when the precise term should be "resident aliens." To satisfy the requirements of the equal protection clause, a state statute's classification, which involves neither a suspect classification nor a fundamental interest, must reasonably fulfill a lawful state purpose with a rational relation between the purpose of the statute and its classification.[23] If the statute's classification is "suspect," the statute must withstand the compelling state interest test and a much higher degree of judicial scrutiny.[24] While alienage is a

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of property for the fifth amendment does not differ materially from the definition of property for the fourteenth amendment.

21. *See* Graham v. Richardson, 403 U.S. 365 (1971) (holding that the term "person" includes *lawfully admitted resident aliens*); Truax v. Raich, 239 U.S. 33, 39 (1915) (Arizona law forbidding employment to an alien who was a *lawful inhabitant* held repugnant to the equal protection clause, since the alien was "a person within its jurisdiction"); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that fourteenth amendment's protections attached to alien who was *within the territorial jurisdiction* of California, regardless of his lack of citizenship). Note the varying formulations of what is meant by "a person within its jurisdiction" set out in the emphasized phrases.

22. *See generally* Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 5-10 (1960). "Within its jurisdiction" was first defined as physically present within the state's territorial limits; next, it was defined as within the jurisdiction of the state's courts; finally, the second definition was modified to one that appears before a state's courts. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Blake v. McClung, 172 U.S. 239 (1898); Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923).

23. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

24. *See generally* Note, *Developments–Equal Protection*, 82 HARV. L. REV. 1065, 1127-31 (1969). A line of recent Supreme Court cases calls for extreme judicial scrutiny where a suspect classification exists. This standard has three requirements: reasonable relation of the classification to a permissible legislative purpose; sufficient precision in the application of the classification to achieve its purpose efficiently; and the necessity of the classification to promote a compelling state interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

suspect classification,[25] it is unclear whether non-resident alienage is also "suspect."

The court in the instant case ruled that section 1026 of the California Probate Code is constitutional on the basis that the impact on foreign relations is merely indirect or incidental, thereby distinguishing *Zschernig* on the facts.[26] Further, the court ruled that a non-resident alien's interest in an inheritance is not protected by the fourteenth amendment's due process clause, since that interest is conditional and not vested. Finally, the court found no violation of the equal protection clause, assuming that the claimants were "persons within its jurisdiction." The court discerned no fundamental interest or suspect classification that would trigger the application of the stricter standard of judicial scrutiny. The court concluded that while alienage was a suspect classification, non-resident alienage was not. Since the purpose of the statute was to promote ascertainable title to property within the state, this purpose was rationally related to the non-resident classification,[27] and the statute did not violate the equal protection clause.

The instant case raises, but does not adequately resolve, two major questions of constitutional dimension. The first question concerns the extent to which a state statute has more than an "incidental or

25. Graham v. Richardson, 403 U.S. 365 (1971).

26. Judge Kaufman pointed out that the application of the statute in the present case involved none of the judicial excursions into the federal government's foreign relations power that the *Zschernig* decision had intended to eradicate.

Additionally, the court held that the statute was not tolled and that the state was not estopped to assert the provisions of § 1026. The court declined to comment on claimants' contention that the taking of their property by the state was contrary to international standards of justice.

Customary international law should be regarded by both state and federal courts as part of the "law of the land." Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law,* 33 AM. J. INT'L L. 740-43 (1939); *See* Maier, *supra* note 11, at 171-72. The United States recognizes as part of the international standards of justice that a state's taking of an alien's property for no public purpose, or without reasonable provision for compensation, or when the property is merely in transit through a state, is wrongful. Unjust discrimination against aliens exists where a state injuriously discriminates against aliens generally, against aliens of a particular nationality, or against a specific individual because he is an alien. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 165, 185, 191 (1965).

27. Because of the distance and expense involved, as well as a probable lack of contacts, a non-resident alien is less likely to appear and demand his interest in the estate within the five year mandatory period.

indirect" impact on foreign relations.[28] The *Clark* test emphasizes a factual determination of the effect that a state statute will have on foreign relations. This approach reduces the court's role to that of speculation. In addition to the extent of the impact of a state statute, another element needs to be added to the *Clark* test to aid the courts in making a more reliable determination.[29] This element would balance the possible adverse transnational repercussions of the statute against the interest a state may have in the continued existence of its law. The court in the instant case found that the impact on foreign relations of section 1026 was "incidental or indirect." Having admitted an impact, the court should have then determined whether this impact was reasonable in relation to the importance of section 1026 to California's maintenance of its inheritance standards. The second major question concerns claimants' status under the fourteenth amendment. The seemingly universal scope of the term "any person" as used in the due process clause of the fourteenth amendment and accepted by the Court in the *Russian Volunteer Fleet*[30] decision suggests that both resident and non-resident aliens with property interests within the United States must be accorded due process protection. In comparison, the wording of the equal protection clause indicates that non-resident aliens in general, and especially those physically outside the jurisdiction of the state, are not to be so protected. The question then becomes whether claimants, such as those in the instant case, are to be accorded due process, but not equal protection, of law. While the protective scope of these two clauses of the Constitution remains undefined with respect to non-resident aliens, the congressional history of the fourteenth amendment,[31] the similarity of the protection provided by the two clauses,[32] and the recent decision of *Bozanich v. Reetz*,[33] which extends the definition of

28. *See* Maier, *supra* note 11, at 133.

29. *Id.* at 163-73.

30. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

31. J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956).

32. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). This companion case to *Brown v. Board of Education* held that the concepts of equal protection and due process of law are not mutually exclusive. While noting that the fifth amendment does not contain an equal protection clause, as does the fourteenth, the Court reasoned that the concepts of equal protection and due process both stem from our ideal of fundamental fairness. Therefore, the class of persons accorded the fifth amendment's due process protections, which include equal protection, should reasonably be the same as that of the fourteenth amendment.

"within its jurisdiction," are persuasive authority for the argument that there is little difference in the classes of persons to whom the due process and equal protection clauses apply. Secondly, the court construed the claimants' succession right too narrowly by finding that a conditional interest in an estate is not property within the scope of the fourteenth amendment's due process clause. The constitutional validity of that determination is especially questionable in light of the equal protection claim. Because the claimants are held to a much stricter standard than that to which citizens and resident aliens are bound, discrimination on the basis of non-resident alienage is compounded by a narrow definition of property. Finally, a large degree of confusion has resulted from the court's failure to distinguish among non-resident aliens having property within the United States, non-resident aliens physically present within the United States, and all other non-resident aliens. As in the instant case, the courts have not sufficiently considered these distinctions in reaching their decisions. Because non-resident aliens in general are at a legal disadvantage as a "discrete and insular minority," [34] the policy of protecting minority rights should demand that the suspect category of alienage include non-resident aliens physically present within the jurisdiction and non-resident aliens having property therein. The conclusion that only resident aliens should be protected by the due process clause is supported by the argument that the courts should not attempt to extend the protection of American constitutional rights to the entire world, but only to the residents and citizens that comprise our society. However, the better reasoned rule is that not only resident aliens but also non-resident aliens either with property rights within the jurisdiction or physically present therein should be recognized as being within a suspect category of alienage. This rule would not extend the constitutional protections beyond practical limits and would be a fundamentally fair method of protecting domestic property that is owned by foreign interests. As a suspect classification, non-resident alienage would raise the strict standard of review. Although section 1026 does not create an unreasonable classification, there is certainly no compelling state interest that would sustain its

33. 297 F. Supp. 300, 304 (D. Alas. 1969), *vacated*, 397 U.S. 82 (1970). Non-resident citizens were allowed to invoke the equal protection clause against another state's fishing laws, although they were not actually "within the jurisdiction." The Supreme Court vacated the decision on grounds of abstention.

34. United States v. Carolene Products Co., 304 U.S. 144 (1938).

constitutionality. The court was confronted with a formidable array of constitutional questions and a paucity of well-defined rules of law to apply. By adding a balancing element to the *Clark* test and recognizing non-resident aliens either with property in a jurisdiction or physically present therein as within a suspect classification, these difficult constitutional issues could be rendered more manageable for future courts.

Clifford Love III

INSURANCE—CONFLICT OF LAWS—CUBAN MONETARY CONTROL LAWS GIVEN EXTRATERRITORIAL EFFECT TO DENY AMERICAN CITIZENS THE BENEFITS OF POLICIES ISSUED IN CUBA

Plaintiffs, beneficiaries of two life insurance policies, alleged that defendant, a Canadian life insurance company,[1] had breached its insurance contracts by refusing to pay the death benefit proceeds in United States dollars.[2] Plaintiffs and the deceased insured[3] were American citizens residing in Cuba[4] when the policies were issued, but after Castro assumed power they fled Cuba and returned to the United

1. Defendant is organized under the laws of Canada and its head office is in Toronto. From 1909 until 1959, defendant issued and serviced policies for Cuban residents through an unincorporated branch office in Havana. Insurance applications obtained by defendant's Cuban agents were forwarded to the head office in Toronto for acceptance or rejection. Even before Castro assumed control, Cuban law required defendant to render quarterly and annual reports of its operations, maintain a register of all Cuban policies, and make a $25,000 deposit with the government. There was a tax advantage to defendant in making investments in Cuba, but no law required it to do so. Defendant had written no new policies in Cuba since Castro's take-over, and maintained merely a token staff to service existing policies and to pay death benefits in Cuba.

2. The complaint contained two counts. In the first count, set out in the text, Johansen sued as the executor of his wife's estate. His wife was the daughter of the insured and the named beneficiary of one of the policies, but she died before this action had commenced. The widow of the insured, named beneficiary of a second policy, joined Johansen on this count. The court's disposition of the first count was controlling on the second count, in which Johansen sought a declaration that the defendant was obliged to accept premium payments, make policy loans, and pay the proceeds upon his death in United States dollars on a third policy of which he was the owner-insured.

3. Thomas Francis Turull y Belling, the deceased-insured, purchased one policy in 1937 and the other in 1939. Each policy carried a death benefit of $25,000 U.S. Turull paid the premiums in dollars until 1948 or 1949, and thereafter and until his death paid in pesos. The total dollar value paid by Turull exceeded the face amounts of these policies.

4. Both Johansen and Turull were born in Brooklyn, New York, and remained American citizens throughout their residency in Cuba. Turull went to Cuba in 1911 and founded an export-import business there. His wife was a Cuban by birth, but she later became a naturalized American citizen. In 1941, Johansen married one of Turull's daughters, who was also an American citizen. Upon discharge from the United States Air Force after World War II, Johansen moved with his wife to Cuba and began to work for his father-in-law. Both Turull and Johansen owned property in New York and frequently lived there with their families during Cuba's hot summer months.

States. Upon the death of the insured in New York in 1961, plaintiffs demanded that the policy proceeds be paid in New York in United States currency as stipulated in the contracts.[5] Defendant refused and declared that Cuban law[6] required only that it pay in pesos in Cuba.[7] The federal district court found that Cuban law governed the performance of these policies and, consequently, defendant was only required to discharge its obligations in pesos in Cuba.[8] On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed. New York public policy is not offended where Cuban law,

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5. Each of these policies provided that "[A]ll sums payable or [receivable] under this policy shall be paid in lawful currency of the United States of America." Further, with respect to place of payment, each policy stated "[A]ll sums payable [receivable] under the policy shall be paid at . . . Havana, Republic of Cuba." Plaintiff alleged that it was defendant's policy and a part of the "sales pitch" to Americans living in Cuba that the policies would be honored in the United States if the buyer returned there. The company did transfer some policies on request from Cuba to New York prior to Castro's currency control laws. *See* note 6 *infra*.

6. From 1914 to 1939, both the United States dollar and the peso were legal tender in Cuba. The value of the peso had diminished by 1939 and the Cuban Government, in order to bolster the sagging peso, enacted a law making the dollar and the peso interchangeable on a one-to-one basis. On June 30, 1951, Cuban Monetary Decree No. 1384 became effective (pursuant to Law No. 13 of December 13, 1948), requiring all contracts theretofore payable in dollars in Cuba to be payable only in pesos. All obligations formerly denominated in United States currency were then changed to pesos, the sole legal tender in Cuba. In accordance with Law No. 13 of 1948, defendant-insurer notified its policyholders that all policies that had referred to American currency would be payable only in Cuban pesos. Johansen and Turull raised no objection to payment in pesos. After Castro's ascension, Law No. 568 was enacted making it a criminal offense to hold dollars in Cuba. All foreign residents' bank accounts were frozen and all dollars held in savings accounts were required to be changed into pesos. Law No. 930 of February 26, 1961, provided that obligations which by agreement were made payable in any other currency were now payable only in pesos.

7. Defendant wanted to pay in pesos because it had invested Cuban policyholders' premiums in Cuban assets in order to meet its obligation from these investments. Such performance was totally worthless to plaintiffs. United States citizens are prohibited from travelling to Cuba or from handling United States currency there. 447 F.2d at 178. Moreover, even if no United States laws prohibited such conduct, the pesos could not be removed from Cuba under Cuban monetary control laws. *See* note 6 *supra*. Finally, even if it were possible to pay in pesos and in New York, plaintiffs would not have had the benefit of their bargain because pesos were worthless in exchange for dollars.

8. Johansen v. Confederation Life Association, 312 F. Supp. 1056 (S.D.N.Y. 1970).

under which the policies were issued and governed, is given extraterritorial effect. *Johansen v. Confederation Life Association*, 447 F.2d 175 (2d Cir. 1971).

During the past decade several cases having factual similarities to the instant case[9] have been litigated. The resulting decisions have not been harmonious.[10] In general, the *ratio decidendi* of these cases has been predicated upon one of three distinct approaches. The first of these approaches has been based upon the International Monetary Fund.[11] Insurers averred that the Cuban monetary control laws were consistent with the International Monetary Fund Agreement, to which the United States and Cuba were signatory members. Consequently,

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9. The instant case is distinguishable from the earlier cases involving Cuban insurance policies in that this is the first such case to be brought by United States citizens. Plaintiffs in the other cases were Cuban national refugees now residing in the United States.

10. *See, e.g.*, Pan American Life Ins. Co. v. Blanco, 362 F.2d 167 (5th Cir. 1966) (act of state doctrine and IMF held not to preclude recovery by insured); Confederation Life Ass'n v. Ugalde, 164 So. 2d 1 (Fla.), *cert. denied*, 379 U.S. 915 (1964) (Florida court obligated by IMF agreement to apply Cuban Law to the performance provisions of the contract); Martinez v. Crown Life Ins. Co., 109 Ga. App. 602, 136 S.E.2d 912 (1964) (act of state doctrine invoked to deny insured recovery); Theye y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 161 So. 2d 70 (1964) (act of state doctrine, IMF, and Cuban monetary control laws held not applicable to deny insured the benefits of his fully performed contract); Varas v. Crown Life Ins. Co., 204 Pa. Super. 176, 203 A.2d 505 (1964) (cash surrender values option construed as a continuing offer that was accepted by the insured in the United States and the law of the place of performance was held to govern); Imperial Life Assurance Co. v. Colmenares, [1967] 62 D.L.R.2d 138 (Can. Sup. Ct. 1967) (the insurance contract was made by insurer's acceptance and decision to "go on risk" in Canada; Canadian law therefore governed). For an extensive discussion of these and related cases, see Paradise, *Cuban Refugee Insureds and the Articles of the International Monetary Fund*, 18 U. FLA. L. REV. 29 (1965); Note, *International Law: Insurance Claims on Policies of Cuban Nationals*, 18 U. MIAMI L. REV. 455 (1963); Comment, 4 TEXAS INT'L L.F. 231 (1968).

11. The International Monetary Fund (IMF) is a special agency of the United Nations, created at the close of World War II for the purpose of avoiding international economic chaos. Member nations of the Fund agree not to impose restrictions on payment for current international transactions and to maintain a fully convertible currency. The Articles of Agreement specifically proscribe any unauthorized restrictions by member states. Furthermore, the Agreement stipulates that unauthorized restrictions are unenforceable in the courts of any member state. *See* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. VIII § 2(b), 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39; Paradise, *supra* note 10.

the United States must enforce insurance contract provisions altered by Cuban law or be in violation of the I.M.F. agreement. In addition, the insurers argued that they had a right to rely on the Cuban monetary laws, that the enforcement of the insurance contracts would allow Cuban nationals to circumvent Cuban law, and that the enforcement of the insurance contracts would cause the insurer to violate Cuban law.[12] Although available as a defense to insurers in the early 1960's,[13] Cuba's withdrawal from the Fund has now rendered this approach nugatory.[14] The second approach has been to rely upon the act of state doctrine in order to give effect to Cuban law. This doctrine prevents the courts of the United States from refusing to give effect to foreign laws and decrees which affect property and persons under the control of the foreign sovereign.[15] Insurers argued that since the enactment of monetary control laws by Cuba was a valid exercise of state power, the United States courts should not be permitted to enforce contracts in contravention of present Cuban

12. The real basis for these arguments was the insurance companies' fear that the Cuban Government would confiscate their assets in Cuba in retaliation for their having made payments to exiled Cuban nationals. *See* Paradise, *supra* note 10.

13. *See* Confederation Life Ass'n v. Ugalde, 164 So. 2d 1 (Fla.), *cert. denied,* 379 U.S. 915 (1964). *Contra,* Pan American Life Ins. Co. v. Raij, 156 So. 2d 785 (Fla. App. 1963); Theye y Ajuria v. Pan American Life Ins. Co., 245 La. 755, 161 So. 2d 70 (1964).

14. Cuba became a member of the Fund in 1953, but withdrew on April 2, 1964. Its withdrawal came on the verge of mandatory expulsion for failure to discharge its obligations in accordance with the Articles of Agreement. "It is settled that the laws of a nonmember nation are not given extraterritorial effect by the terms and conditions of the [International Monetary Fund]." Confederation Life Ass'n v. Vega y Arminan, 207 So. 2d 33, 38 (Fla. App. 1968); *cf.* Stephen v. Zivnostenska Banka, 31 Misc. 2d 45, 140 N.Y.S.2d 323 (Sup. Ct. 1955) (court held that there was no obligation to give extraterritorial effect to monetary control laws of Czechoslovakia, a former member of the IMF).

15. "Our courts will not examine a foreign law to determine whether it was adopted in conformity with the internal procedures and requirements of the enacting state." French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968). The now classic statement of the act of state doctrine was first announced in Underhill v. Hernandez, 168 U.S. 250, 252 (1897): "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Accord,* Dougherty v. Equitable Life Assurance Soc'y of the United States, 266 N.Y. 71, 193 N.E. 897 (1934).

law.[16] The act of state doctrine has not been found applicable in most cases, however, because a judgment for the insured would not affect the integrity of Cuban law.[17] The third and most common approach has been to apply conflict of laws rules. Traditionally, matters relating to the execution of the contract are governed by the law of the place where the contract is made, while matters relating to performance are governed by the law of the place of performance.[18] In *Auten v. Auten*, New York broke the bonds of the traditional conflicts rules of contracts by adopting the "grouping of contacts" or "center of gravity" approach.[19] Under this theory, the law of the state or country having the greatest number of significant contacts would be adopted regardless of the physical place of making or of performance of the contract. More recently, the "greatest interest" theory has evolved in New York as the appropriate conflicts rule.[20] This

16. Martinez v. Crown Life Ins. Co., 109 Ga. App. 602, 136 S.E.2d 912 (1964) (court dismissed the action on the grounds that the *Sabbatino* case left it no choice but to apply the act of state doctrine); *cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

17. 447 F.2d at 180. *See* Pan American Life Ins. Co. v. Blanco, 362 F.2d 167 (5th Cir. 1966) (court held that recovery was not precluded by the act of state doctrine. Moreover, the contractual rights "were not expropriated and probably could not have been."). *Accord,* Oliva v. Pan American Life Ins. Co., 448 F.2d 217 (5th Cir. 1971).

18. Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 141, 19 N.E.2d 992, 995 (1939). *See* Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 576 (1969) (dictum). *See generally* 1 COUCH, CYCLOPEDIA OF INSURANCE LAW § 3:1 (2d ed. R. Anderson 1959); 3 RABEL, THE CONFLICT OF LAWS—A COMPARATIVE STUDY 319 (2d ed. 1958).

19. The leading case for the "center of gravity" conflicts rule is Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). There, the court found that England had the greatest number of significant contacts in this property settlement case and was more intimately concerned with the outcome of the litigation than New York. *See, e.g.,* Fleet Messenger Service, Inc. v. Life Ins. Co. of North America, 315 F.2d 593 (2d Cir. 1963) (adoption of the "grouping of contacts" rule in situations having elements connected with more than one jurisdiction); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (court rejected the "situs of the tort" test in diversity tort action and adopted the "center of gravity" rule). *See also* Hazel Bishop, Inc. v. Perfemme, Inc., 314 F.2d 399 (2d Cir. 1963); Royce Chemical Co. v. Sharples Corp., 285 F.2d 183 (2d Cir. 1960).

20. "[T]he rule that has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State

approach allows the court to apply the law of the jurisdiction having the greatest interest in the outcome of the particular litigation. In contracts cases, two important factors that are considered by the courts in deciding which jurisdiction's law to apply are the domicile of the party seeking recovery[21] and the public policy of the forum state.[22] As a general rule, if the plaintiff is a domiciliary of the forum, the courts have sought to protect his interests,[23] especially if doing so

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interests are those which relate to the purpose of the particular law in conflict." Miller v. Miller, 22 N.Y.2d 12, 15, 237 N.E.2d 877, 879, 290 N.Y.S.2d 734, 737 (1968). This rationale was recently followed in the Federal District Court for the Southern District of New York in Oakley v. National Western Life Ins. Co., 294 F. Supp. 504 (S.D.N.Y. 1968). "It appears that in New York the most significant 'contacts' to be evaluated are the relative interests of the states involved." 294 F. Supp. at 507. *Accord,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comment *f* at 14 (1969).

21. *See* Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); *In re* Crichton, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967); *cf.* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964) (Court stated that insurance companies should forsee that their insureds may move and that insurance contracts are therefore normally enforceable in the state wherein the insured has some significant contact with the forum state).

22. *See* Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969) (New York had superior interest in having its public policy applied in a contract matter). "[W]here the foreign jurisdiction has no interest in the application of its law, where there was no clear expression of intent that foreign law governs and where we have the power to apply our own law and give effect to the policy this State has adopted . . . we should apply our own law." *In re* Crichton, 20 N.Y.2d 124, 137, 228 N.E.2d 799, 808, 281 N.Y.S.2d 811, 823 (1967) (action involving property rights); *accord,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 192 (1969). *But see* Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (court held that even though the parties involved in this negligence action were domiciliaries of New York, Colorado had a greater interest in the outcome of the litigation and New York public policy would not bar application of Colorado law).

23. "As between two states, the law of that one which has the predominant, if not the sole interest in the protection and regulation of the rights of the person and persons involved should, of course, be invoked." *In re* Clark, 21 N.Y.2d 478, 485-86, 236 N.E.2d 152, 156, 288 N.Y.S.2d 993, 998 (1968); *cf.* Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939) (Court held that a state is not bound by the full faith and credit clause of the federal constitution to give effect to another state's law which is contrary to the public policy of the forum); National Screen Service Corp. v. United States Fidelity & Guaranty Co., 364 F.2d 275 (2d Cir. 1966). "There is a general tendency in a majority of jurisdictions to choose the construction of insurance contracts most favorable to the insured." 364 F.2d at 277.

conforms to that state's public policy and no other jurisdiction has a substantial countervailing interest in the outcome of the litigation.[24]

The court in the instant case initially acknowledged the well-settled rule that a federal court sitting in a diversity action involving a conflict of laws question must apply the choice of law rule of the forum state.[25] In resolving the conflicts question presented by this case, the court first determined that under either the traditional conflicts rules,[26] the "grouping of contacts,"[27] or the "greatest interest" tests, Cuban law governed the outcome of this case. The court found that there were more contacts with Cuba than with New York;[28] in addition, cases relied upon by plaintiff for the "greatest interest" rule were inapposite to the facts in the case at bar.[29] The court agreed with plaintiffs' argument that the domicile of the party seeking recovery was crucial to the application of the greatest interest test but determined that it seemed more logical to determine domicile at the time of entering into the contract than at the time of bringing suit.[30] Furthermore, the court declared that in any event the case did not involve a conflict of laws question since there was no problem

24. "[C]ourts must be on the alert against making exception to the local law that would defeat a legitimate interest of the forum state without serving the interest of any other state." Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 669 (1959). *But see* Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

25. In accordance with the doctrine of Erie v. Tompkins, 304 U.S. 64 (1938), federal courts sitting in a diversity action must apply the choice of law rule of the forum state. *See* Zogg v. Penn Mutual Life Ins. Co., 276 F.2d 681 (2d Cir. 1960); Stentor Elec. Mfg. Co. v. Klaxton, 125 F.2d 820 (3d Cir.), *cert denied*, 316 U.S. 685 (1942); Oakley v. National Western Life Ins. Co., 294 F. Supp. 504 (S.D.N.Y. 1968).

26. *See* note 18 *supra* and accompanying text.

27. *See* note 19 *supra* and accompanying text.

28. Thus sustaining the district court's finding that Cuban law had always controlled these contracts. 312 F. Supp. at 1063.

29. Plaintiff had relied upon, *inter alia*, Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968) (wrongful death action) and *In re* Crichton, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967) (case involving property rights). The court did not distinguish Intercontinental Planning v. Daystrom, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969), another case cited by plaintiff which did involve a contract question and where the New York court applied the "most significant interest" test. *See* notes 20-24 *supra* and accompanying text.

30. The instant court upheld the district court's finding of fact that plaintiffs and Turull were residents and domiciliaries of Cuba at the time the contracts were made. 312 F. Supp. at 1063.

concerning conflicting legal rules. It announced that the real question was whether a New York court would give extraterritorial effect to Cuban laws which manifestly governed the contracts or would refuse to do so on the ground of New York public policy. The court reasoned that even though the act of state doctrine[31] was not involved in this case, there was no policy or reason for a New York court to refuse to give extraterritorial effect to Cuban law. Finally, the court found that the equities involved favored the defendant since other policy-holders in defendant's mutual company would be affected adversely by payment from general assets, and since defendant could not use the Cuban assets for its own benefit, there would be no unjust enrichment by refusing payment in dollars. In a vigorous and extensive dissent, Judge Feinberg concluded that since the policy expressly provided for payment in United States dollars, it should be enforced as the parties originally intended.[32] Moreover, of the three jurisdictions having any contact with these policies, Cuba had the least interest in the outcome of the case.[33] Feinberg contended that New York courts would not apply Cuban law and render worthless plaintiffs' benefits since New York has an announced policy of protecting the rights of insureds and beneficiaries.[34]

The fundamental question before the court in the instant case was which of two innocent parties should bear the loss occasioned by the Cuban government. An application of traditional equity concepts and values would have caused judgment to have been rendered for

31. *See* notes 15 & 16 *supra* and accompanying text.

32. Since it was explicitly stated in the contract that payment was to be made in dollars and since both contracting parties intended dollars to be the medium of payment, this language should be enforced. *See* note 5 *supra*. The place of performance is unimportant, said Feinberg, because defendant typically made place of payment in the capital city for the convenience of the parties. The place of performance was not an essential part of the bargain; moreover, in many other instances defendant had paid elsewhere. 447 F.2d at 186, 187.

33. Feinberg conceded that Cuba had the greatest number of contacts, but emphasized that Cuba had no interest in the outcome of the case because defendant's Cuban assets would not be removed if defendant had to pay, nor would any Cuban currency control laws be affected by a decision for plaintiffs. Canada had already refused to apply Cuban law to a similar case because it recognized its obligation to see that companies domiciled in Canada discharge their obligations. Imperial Life Assurance Co. v. Colmenares, [1967] 62 D.L.R.2d 138 (Can. Sup. Ct. 1967).

34. New York has the most significant interest in the protection of the domiciled beneficiaries and would apply its law, there being no conflict with Canadian law and no justification for applying Cuban law. 447 F.2d at 185.

plaintiffs, even if the court had been correct in its resolution of the conflicts question. The insureds had performed fully their obligations under the contracts until further performance was made impossible by the Castro regime.[35] Whether they paid in pesos or dollars is not significant since during the entire period of the insured's performance, the value of the dollar and peso was substantially equivalent. Consequently, payment of the policies in dollars in the United States would not be a windfall for plaintiffs, nor would payment in dollars be a harsh result for defendant since its total assets were pledged to its obligations. Defendant's voluntary investment in Cuban assets and the subsequent de facto expropriation of these assets are unfortunate, but there is no equitable reason or policy which demands that defendant's loss pass to plaintiffs.[36] A more egregious error was committed by the court when it refused to adopt the present New York choice of law rule and declared that no conflicts question was presented by the instant case.[37] This determination casts a cloud upon the validity of the instant holding and subjects the decision to severe criticism on the grounds of the *Erie* doctrine.[38] The choice of law rule in New York is based unequivocally upon the "greatest interest" principle and the policy and rationale of this conflicts theory dictate its application to the instant case. Cuba had absolutely no interest in having its law affect the outcome of this case. A judgment for plaintiffs would not have caused any Cuban assets to have been liquidated nor any pesos to leave Cuba in violation of its laws. Moreover, it would not have been

35. *See* Confederation Life Ass'n v. Vega y Arminan, 207 So. 2d 33, *aff'd on rehearing*, 207 So. 2d 39 (Fla. App.), *aff'd*, 211 So. 2d 169 (Fla. 1968) (Cuban refugee brought suit in equity after its dismissal at law. Chancellor found no equitable reason why plaintiff should not recover on the insurance contract after having performed his obligation).

36. One further consideration should be mentioned here. If the Governments of Canada and Cuba were to reconcile their differences, it is not unlikely that defendant will recover at least part of its money now bound up in Cuban investments. Plaintiffs, however, would gain nothing if a settlement were reached because their rights have been judicially vitiated.

37. It is unfortunate that the court failed to state with more precision why it believed a conflict of laws question was not present in this case. Perhaps it believed that the case presented a false or illusory conflict. In any event, the court's disposal of the problem was inadequate and a classic example of circular reasoning: "[W]e feel that this case does not present a conflict-of-laws question because it does not involve a choice among conflicting legal rules." 447 F.2d at 180. For an excellent treatment of the complex "False Conflicts" concept see 24 VAND. L. REV. 615 (1971); Traynor, *supra* note 24.

38. *See* note 24 *supra*.

illegal under Cuban law for defendant to pay in a place other than that designated in the place of payment clause. Nonetheless, Cuban law provided that payment under these contracts could be made only in Cuba in pesos—a law which unquestionably conflicts with New York law and policy favoring the insured in adhesion contract disputes. Canada previously had rendered judgment against a Canadian insurer in a case involving facts almost identical to those of the present case.[39] Consequently, the New York court, had it found that Canada had the greatest interest in this case, would have applied Canadian law and found for plaintiffs. On the other hand, the court could have found that New York had the paramount interest in the outcome of this case because of its strong public policy of protecting the rights of its resident insureds and beneficiaries.[40] The court felt that the "greatest interest" rule would not obtain in this case since it found that plaintiffs and the deceased insured were domiciliaries of Cuba when the contract was made. It is not disputed that the plaintiffs and the deceased were residents of Cuba for an extended period, but physical presence in a place does not create a change of domicile.[41] Domicile requires a present intent to make a fixed locality a permanent home.[42] Here, the Cuban residency was a necessity of their business enterprise. The parties had always intended to return to the United States upon retirement and indeed maintained property in

39. Imperial Life Assurance Co. v. Colmenares [1967] 62 D.L.R.2d 138 (Can. Sup. Ct. 1967). As pointed out by the dissent, the Canadian Supreme Court refused to apply Cuban law to facts "not fairly distinguishable" from the instant case. 447 F.2d at 186.

40. *See* National Screen Service Corp. v. United States Fidelity & Guaranty Co., 364 F.2d 275 (2d Cir. 1966); Zogg v. Penn Mutual Life Ins. Co., 276 F.2d 861 (2d Cir. 1960); Oakley v. National Western Life Ins. Co., 294 F. Supp. 504 (S.D.N.Y. 1968); *cf.* Clay v. Sun Life Ins. Co., 377 U.S. 179 (1964); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Reporter's notes § 192, comment *d* at 608: "In international cases, the courts have frequently not applied the local law [Cuban] of the insured's domicile if under that law the policy would be forfeited." *Accord,* Varas v. Crown Life Ins. Co., 204 Pa. Super. 176, 203 A.2d 505 (1964), (court should apply the rule that protects the insured).

41. "Mere change of residence although continued for a long time does not effect a change of domicile." *In re* Newcomb's Estate, 192 N.Y. 238, 84 N.E. 950 (1908).

42. "An intention to make a place one's home for a limited time may not effect a change of domicile when there is a present intent to return to the previous home." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 18, comment *b* at 70. *See In re* James' Will, 221 N.Y. 242, 116 N.E. 1010 (1917) (the intent to establish domicile, especially in a foreign country, must be clearly established).

New York for this purpose.[43] In any event, the burden of proof is on the party who asserts that a change of domicile has taken place,[44] and it is not clear that defendant carried that burden. Even assuming, *arguendo*, that the insureds were domiciled in Cuba, they had been domiciled in New York for approximately ten years prior to bringing this action. Seemingly, plaintiffs should now be permitted to have the benefit of New York's policy of protecting the rights of the insureds and beneficiaries. Following this court's rationale in subsequent insurance cases would require a finding that the law to be adopted is that of the state in which the insured was domiciled when the contract was made. Such a harsh result cannot be reconciled with the policy of New York's "greatest interest" conflicts of laws principle.[45]

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43. The court noted in the opinion that both insureds stated in their application for insurance that Cuba was their residence and that they did not intend to change domicile. This was construed by the court to be "clear and convincing evidence" of their intent to be domiciled in Cuba. A layman's statement on an adhesion contract that no change of domicile was intended is certainly not worthy of the weight accorded it by the court. Moreover, such a statement is capable of the reverse presumption. The insureds could well have been saying that they had no intent to change their domicile from New York to Cuba. It is admittedly a small point, but the court found it to be the determinant for their finding of Cuban domicile.

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19, comment *c* at 18.

45. Nor can this result be reconciled with the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 187, 188, 192. *See, e.g.*, § 188, comment (*1*) (*b*) at 571: "[P]rotection of the justified expectations of the parties is the basic policy underlying the field of contracts . . . . [T]heir expectations should not be disappointed by application of the local law rules of a state which would strike down the contract or a provision thereof unless the value of protecting the parties is substantially overweighed in the particular case by the interest of the state with the invalidating rule in having the rule applied." *See also* Weintraub, *The Contracts Proposals of the Second Restatement of the Conflict of Laws–A Critique*, 46 IOWA L. REV. 713 (1961).

JURISDICTION—WARSAW CONVENTION—LOCATION OF AIRLINE TICKET OFFICE IN THE UNITED STATES INSUFFICIENT CONTACT FOR PURPOSES OF FEDERAL JURISDICTION

Plaintiff, a United States citizen, brought an action in the United States District Court for the Southern District of New York to recover damages for personal injuries allegedly suffered during a flight from Vancouver, British Columbia, Canada, to Tokyo, Japan, on defendant's aircraft. The flight ticket was purchased by plaintiff in Vancouver. Defendant carrier, a Canadian domiciliary, maintained a ticketing and booking office in New York. Plaintiff alleged that the district court had jurisdiction under article 28(1) of the Warsaw Convention[1] and under 28 U.S.C. §§ 1331(a) and 1332(a)(2) (1970).[2] Article 28(1) provides four contacts on which an injured party may rely in order to maintain jurisdiction over a defendant carrier: (1) the domicile of the carrier; (2) the carrier's principal place of business; (3) the carrier's place of business through which the contract was made; or (4) the place of destination.[3] Defendant moved to dismiss the complaint for lack of subject matter jurisdiction, or, in the alternative, for improper venue, on the ground that none of the conditions of article 28(1) were satisfied. Faced with the question whether the limitations of article 28(1) applied in the international or in the domestic sense, the district court held that the article relates solely to domestic venue and that venue was properly established since

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature,* October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Convention]. Under article 1(1), the Convention "shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire . . . ." Both parties agreed that the Convention governed this case, since Japan, Canada, and the United States are all High Contracting Parties within article 1(2). Eventually, over 90 countries became parties to the Convention.

2. Section 1331(a) provides, in pertinent part, that "district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or *treaties* of the United States" (emphasis added). Section 1332(a)(2) provides further that the controversy must be between "citizens of a State, and foreign states or citizens or subjects thereof . . . ."

3. 49 Stat. 3000, 3020 (1935). Article 28(1) provides: "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination."

defendant carrier maintained a place of business within the jurisdiction of the court. On appeal to the United States Court of Appeals for the Sixth Circuit, *held*, reversed. Where a ticket for an international flight is purchased outside of the United States and no contacts with the United States exist beyond the presence of a ticketing and booking office of the carrier, the limitations of article 28(1) of the Warsaw Convention prohibit international jurisdiction within the United States. *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971).

The purpose of the Warsaw Convention was to establish uniformity in international air transportation.[4] Pursuant to this goal the Convention adopted article 28(1), which enumerated four forums in which suits could be brought for alleged Convention violations—the carrier's domicile, its principal place of business, its place of business through which the contract was made, or its place of destination.[5] Three controversial questions have arisen concerning the meaning and scope of article 28(1): whether the delineation of contacts in article 28(1) was meant to guarantee or to limit plaintiff's choice of forums;[6] whether article 28(1) pertains to domestic or national jurisdiction; and whether article 28(1) applies to venue or to subject matter jurisdiction.[7] Regarding the first question, the prevailing view has been that article 28(1) limits the possible places where the suit may commence.[8] As to the second issue, the earlier cases generally held that even if none of the places enumerated in article 28(1) were located within the jurisdiction of the particular American court before which the action had been brought, then the action must be dismissed. Thus, in *Winsor*

4. *See, e.g.*, Pierre v. Eastern Air Lines, Inc., 152 F. Supp. 486 (D.C.N.J. 1957); D. GOEDHUIS, NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION (1937).

5. *See generally* Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COM. 217 (1959).

6. *Compare, e.g.*, Berner v. United Airlines, Inc., 3 App. Div. 2d 9, 147 N.E.2d 732, 157 N.Y.S. 2d 884 (App. Div. 1956) (guarantee) *with* Mertens v. Flying Tiger Line, Inc., 351 F.2d 851 (2d Cir. 1965) (limit).

7. For a good analysis of this particular controversy (as well as an extensive account of the history and impact of the Convention itself) see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

8. *See* McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 217 (1963). The author construes the original text of the article, which uses the phrase, *devra être portée*, to mean that the action *must be brought* within one of the four categories, *i.e.* that the four are exclusive.

v. United Air Lines, Inc.,[9] the fact that the carrier was incorporated in Delaware was not recognized as a sufficient ground under article 28(1) for maintaining the action in a New York federal court.[10] More recent cases have rejected this view, however, holding that article 28(1) is not concerned with domestic jurisdictional subdivisions of the United States. The action may be maintained in any American court,[11] state or federal, as long as one of the four places designated in article 28(1) is located somewhere within the United States.[12] A split of opinion exists whether article 28(1) applies to venue or to subject matter jurisdiction.[13] In *Eck v. United Arab Airlines, Inc.*,[14] the ticket for an international flight was purchased in California for a Switzerland -Sudanese Republic flight. Relying on the purchase of the ticket at a site within the United States through an agency of the carrier, plus the existence of a regular ticketing and booking office within the United

9. 153 F. Supp. 244 (E.D.N.Y. 1957).

10. *See also* Martino v. Trans World Airlines, Inc., 1961 U.S. & Can. Av. 651 (N.D. Ill. 1961) (the Illinois federal district court dismissed the action in which the carrier was incorporated in Delaware and had its principal place of business in Missouri, when the contract was made in Washington, D.C., and where the destination was New York).

11. Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798, 800 n.3 (2d Cir. 1971).

12. *See, e.g.*, Pardonnet v. Flying Tiger Line, Inc., 233 F. Supp. 683, 686 (N.D. Ill. 1964) (it seems doubtful that the drafters of the Warsaw Convention, almost all of whom were from civil law countries and only a few of whom were from countries which have a federal system similar to that in the United States, would be concerned at all with the internal operations of the judicial system of any particular nation); Pitman v. Pan American World Airlines, Inc., 223 F. Supp. 887, 888 (E.D. Pa. 1963) (article 28(1) refers only to national boundaries and not to places within the boundaries of countries); Spencer v. Northwest Orient Airlines, Inc., 201 F. Supp. 504, 507 (S.D.N.Y. 1962) (since article 28(1) was drafted in contemplation of adherence by many nations with widely divergent systems of jurisprudence and court structure, it was not intended that the article deal with questions of technical subject matter jurisdiction within the framework of the federal system of the United States). *See also* Lowenfeld & Mendelsohn, *supra* note 7, at 523.

13. Attempts to label article 28(1) illustrate this split of opinion. For example, when reprinted as part of the documents of the 1955 Hague Conference on Private Air Law, article 28(1) was labeled "Jurisdiction and procedure." The French and British versions in the same documents are not labeled at all. The original description of the article by the United States appeared in the margin at 49 Stat. 3020 as "Venue of action." However, the codification at 49 U.S.C. § 1502 (1970), contains no accompanying label. 452 F.2d at 800 n. 6.

14. 360 F.2d 804 (2d Cir. 1966).

States, the Second Circuit Court of Appeals concluded that venue was properly laid under article 28(1). *Nudo v. Société Anonyme Belge D'Exploitation* [15] represents the subject-matter jurisdiction interpretation of article 28(1). The plaintiff in *Nudo* purchased a ticket in Munich for a flight from Brussels to Munich. The domicile of the defendant carrier was in Belgium. The District Court for the Eastern District of Pennsylvania rejected plaintiff's contention that the court had subject matter jurisdiction, on the grounds that defendant's sole contact was the maintenance of a ticket office in Philadelphia where it did a substantial amount of business. Thus, although article 28(1) appears to limit the possible forums available under the Warsaw Convention, and although the "national" approach to jurisdiction has become the prevailing judicial and academic view, the question whether article 28(1) refers to venue or to subject matter jurisdiction remains unanswered.

In the instant case, the court held that there are two levels of judicial power that must be examined in actions arising under the Warsaw Convention: jurisdiction in the international (or treaty) sense under article 28(1); and jurisdiction in the domestic law sense (*i.e.* the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case). It is only after jurisdiction in both senses is established that the question of venue is reached. The court noted that there was no indication that the drafters of the Convention were concerned with the American court system's distinction between venue and jurisdiction. It therefore followed that the four contacts specified in article 28(1) were meant to be applied to the particular factual situation of the case before any questions of domestic jurisdiction or venue were concerned. The court concluded that defendant carrier's principal place of business was in Canada and that the contract for flight was not made through the carrier's ticketing agency located in the United States. [16] The court distinguished *Eck v. United Arab Airlines, Inc.* [17] According to the court, *Eck* was not meant to be applied to the present situation, where all activities concerning the international flight occurred outside the United States, and where the only contact with the United States was

15. 207 F. Supp. 191 (E.D. Pa. 1962).

16. According to the instant court, Smith did not pursue his contention in the lower court that suit be allowed on the basis that New York was the carrier's "principal place of business" within article 28(1); instead, he relied upon his assertion that the carrier maintained in New York "a place of business through which the contract has been made." 452 F.2d at 802.

17. 360 F.2d 804 (2d Cir. 1966).

the presence of a ticketing and booking office. [18] Since none of the elements of article 28(1) were established, there was no basis for international jurisdiction at the first level. Therefore, the necessity of resolving the second level domestic law questions of jurisdiction and venue was obviated, and plaintiff's suit was dismissed for lack of international jurisdiction under the Warsaw Convention.

In this case the court developed a logical test to use in determining whether to grant or deny jurisdiction under article 28(1) of the Warsaw Convention, but the court's strict adherence to procedure overlooked the substantive basis of the Convention itself. The court's test, containing analysis at two distinct levels, relegates the venue-jurisdiction issue to the domestic level, thereby rendering the establishment of jurisdiction in the international sense of threshold importance. It is possible that future courts, whether American or foreign, may utilize the court's guideline in achieving a more uniform application of the jurisdictional provisions of article 28(1). Such procedural uniformity would achieve the desired result of a degree of certainty that would be beneficial to both the claimant and the carrier. It is also possible, however, that courts, in following this court's analysis, will render the test useless by distinguishing future cases on the facts. In other words, the court's strict interpretation of the limitations of article 28(1) narrows the applicability of its test. Furthermore, the instant court has done little to justify its denial of access to United States courts in light of the rapidly changing state of international air travel. At the time of the conception of the Warsaw Convention, the four contacts of article 28(1) were thought to provide benefits to passengers that would be unavailable without the Convention. Yet, because it is now often difficult to establish the principal place of business or the domicile of the carrier, the Convention actually precludes jurisdiction where it otherwise could have been found. [19] Therefore, the four contacts provided in article 28(1) should receive different treatment in the future if passengers on international flights are to receive the benefits intended by the drafters of the Convention. If the wording of article 28(1) remains unchanged, it would seem

18. The court noted that nothing was shown to prove that there had been any ticketing arrangements whatsoever between Vancouver and the United States office. 452 F.2d at 803.

19. *See* Lowenfeld & Mendelsohn, *supra* note 7, at 576. For example, in the instant case plaintiff could have maintained jurisdiction over Canadian Pacific in New York (or in any other place within the United States where the airline operates an office) under 28 U.S.C. § 1332(a)(2) (1970) (diversity jurisdiction), or under 28 U.S.C. § 1391 (1970) (general venue provisions for federal courts).

reasonable, in light of the increased number of major airline establishments, to construe "the principal place of business" to mean "an important" place of business.[20] An airline holding itself out as a corporation serving individuals in countries where it maintains a business establishment should be amenable to suit there. Since the passenger's domicile is the one forum with which he or his attorney probably is best acquainted, where his estate usually will be probated, and where he will recover appropriate damages for himself or his survivors,[21] a more comprehensive solution to the present problem would be to amend article 28(1) to allow the plaintiff's domicile as the primary jurisdictional contact. If, and only if, the passenger's domicile cannot be determined (for instance, if the passenger is a transient), then jurisdiction should be allowed: (1) at the domicile of the carrier; (2) where the carrier maintains an important place of business;[22] or (3) at the place of destination. The suggested amendment, which would place primary emphasis on the passenger's domicile, would not only allow the claimant to recover damages more appropriate to those he would ordinarily receive in his own country, but also would provide a predictable jurisdictional standard on which both passenger and carrier may rely. In summary, it is clear that the intended uniformity of application of rules under the Warsaw Convention has not been accomplished by strict adherence to the present provisions of article 28(1). A more liberal interpretation by future courts, or amendment of article 28(1) itself, coupled with the two level analysis suggested by the instant court would serve to establish certainty in the rules pertaining to jurisdiction in suits arising from international air travel.

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20. *See* Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention,* 9 McGILL L.J. 352, 356 (1963). *But see* Eck v. United Arab Airlines, Inc., 360 F.2d 804, 809 n.9 (2d Cir. 1966).

21. *See* Allan I. Mendelsohn's speech in *Symposium on the Warsaw Convention,* 33 J. AIR L. & COM. 519, 628 (1967). One of the greatest criticisms of the Warsaw Convention concerns the limited liability of carriers (originally, recovery was limited to approximately $8,300, but the Convention was amended at the 1955 Hague Conference on Private Air Law to allow recovery of twice that amount). Mr. Mendelsohn believes that by establishing jurisdiction according to the domicile of the passenger such controversy may be resolved.

22. It is suggested that this second provision would encompass the second and third provisions of the present article 28(1), thus providing a contact more suitable to the present state of international air transportation.