Indiana and the World: International Business Law

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A. Developments In Indiana

1. Indiana Case Law.—The only significant Indiana case with international implications during 1983 was *Skrundz v. Review Board of the Indiana Employment Security.*[5] A group of seventy-one maintenance workers employed by Inland Steel Company in East Chicago lost their jobs in a carbon steel factory. Carbon steel workers were certified as workers affected by foreign competition under the Trade Act of 1974.[6] The purpose of this certification is to enable workers, discharged because of the effects of foreign competition, to receive a trade readjustment allowance (TRA) under the Act.[7] In this particular case, the carbon steelworkers were laid off during the certification process.

Some of the group's members were dissuaded by United States government representatives from applying for TRA's. These representatives argued that the workers were ineligible because they were maintenance workers and not directly involved in production. After the expiration of the two year certification period, and after the TRA Review Board denied all retroactive claims for TRA, each worker filed a written application for a TRA.[8] In proceedings before a referee, it was discovered that some workers filed late because the Review Board told them they were ineligible. Yet no evidence was discovered that the Review Board did not permit those workers to file.[9]

Several important issues were raised: first, whether the Review Board had breached the Act by discouraging application and establishing non-retroactive restrictions; second, whether maintenance workers were covered under the Act; and third, whether the agency charged with the responsibility to administer the Act should have assisted the affected workers.[10]

The Indiana Court of Appeals held that the agency did not violate

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[5]444 N.E.2d 1217 (Ind. Ct. App. 1983).

[6]19 U.S.C. § 2271 (1982).

[7]444 N.E.2d at 1225.

[8]*Id.* at 1219.

[9]*Id.* at 1220.

[10]*Id.*

the Act by dissuading workers from applying, nor by its failure to provide assistance.[11] Rather, the agency violated the Act when it limited the time for filing.[12] As a result, the case was reversed and remanded.[13]

The court reasoned that there was no duty to assist the workers when the agency believed they were ineligible.[14] By placing time limits for filing a claim however, the agency had misconstrued the Act. Moreover, it was determined unimportant whether or not the maintenance workers were expressly members of the group of employees the carbon steel industry union sought to protect.[15] The purpose of the Trade Act of 1974, the court determined, was to give greater protection than provided under unemployment compensation in the event of harmful effects occasioned by foreign competition.[16] Therefore, the agency should not restrict coverage to only those workers who were directly affected.[17]

Skrundz is significant because of the manner in which the court chose to interpret the Trade Act of 1974. Rather than opting for a technical construction, it chose to construe the Act to realize the purposes of its framers, providing compensation to workers affected by foreign competition, either directly in the case of production workers, or indirectly in the cae of maintenance workers.

2. Legislative Update.—An important development in Indiana affecting international trade was the act establishing the Indiana Employment Development Commission (IEDC).[18] In part, this act permits the IEDC, under certain circumstances, to guarantee loans for working to extend loan guarantees for working capital if it determines that such a loan "is for an industrial development project or agricultural or mining operations . . . and . . . will lead directly to increased production and job creation through . . . exports to foreign markets."[19] Loan guarantees permitted under this statute are nonrenewable, limited to $500,000 per guarantee for any single project, and may not exceed eighteen months.[20]

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[11]*Id.* at 1221.

[12]*Id.* at 1223.

[13]*Id.* at 1227.

[14]*Id.* at 1221.

[15]*Id.* at 1226.

[16]*Id.* at 1225.

[17]*Id.* at 1226.

[18]Act of Apr. 19, 1983, Pub. L. No. 24-1983, Sec. 4, 1983 Ind. Acts 287 (codified at IND. CODE §§ 4-4-11-2, -3, -15, -16 (Supp. 1984)).

[19]IND. CODE § 4-4-11-16(c)(1),(2) (Supp. 1984). The IEDC was established for the "public purpose of promoting opportunities for gainful employment and business opportunities by the promotion and development of industrial development projects, mining operations, and agricultural operations that involve the processing of agricultural products, in any areas of the state." IND. CODE § 4-4-11-2(b) (Supp. 1984).

[20]*Id.* § 4-4-11-16(c)(1).

B. National Developments

The year 1983 promised to be the year of trade. It was not. As the 98th Congress began its deliberations, many expected that a strong domestic content bill would be enacted. The House of Representatives passed such a bill in a form stronger than originally drafted,[21] but the Senate showed no inclination to follow. With minimal funding, adjustment assistance for workers displaced by imports was extended for two years and a watered-down version of the Caribbean Basin Initiative was enacted.[22] There were, however, substantial developments in the federal courts.

1. Decisions of the United States Supreme Court.—A case of particular significance to state taxing authorities decided during the survey period was *Container Corp. of America v. Franchise Tax Board*.[23] California imposed a corporate franchise tax based upon the apportionment of a corporation's total income arrived at by applying a "unitary business" formula.[24] During the years in question, Container filed its return omitting the payroll, property, and sales figures of its foreign (international) subsidiaries. After conducting an audit, California assessed additional taxes for the income from the omitted items.[25] Container paid the taxes under protest and filed for a refund.[26] The additional assessments were upheld at the trial and appellate levels; subsequently, Container sought review by the United States Supreme Court.[27]

Several issues were before the Court: whether it was improper for California to treat a domestic corporation and its foreign subsidiaries as a unitary business for state income tax purposes;[28] whether California's three factor formula met the "constitutional requirement of 'fair apportionment'",[29] and, whether California violated the Foreign Commerce Clause of the Constitution by its failure to utilize an "arm's-length" analysis employed by other governments in "evaluating the tax consequences of inter-corporate relationships."[30]

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[21]H.R. 1234, 98th Cong., lst Sess. (1983).

[22]Act of Aug. 5, 1983, Pub. L. No. 98-67, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 369-98.

[23]103 S. Ct. 2933 (1983), *reh'g denied*, 104 S. Ct. 265 (1983). For an extensive discussion of this case, see Stuart & Williams, *Constitutional Considerations of State Taxation of Multinational Corporate Income: Before and After* Container Corporation of America v. Franchise Tax Board, 16 IND. L. REV. 783 (1983).

[24]103 S. Ct. at 2939.

[25]*Id.* at 2944.

[26]*Id.* at 2945.

[27]*Id.*

[28]*Id.* at 2939.

[29]*Id.*

[30]*Id. See* U.S. CONST. art. I, § 8, cl. 3. Under the arm's-length approach, every corporation, even if closely tied to other corporations, is treated for most—but decidely

The Court noted that the constitutionality of the "unitary business" formula, subject to some constraints, has been upheld in many cases. Furthermore, in a case such as this, the petitioner has the burden of proving that the state used either the wrong standards for the test or clearly taxed values not within the state's domain.[31]

California successfully demonstrated to the Court that the California parent was involved in the activities of the subsidiary, including the making of loans, loan guarantees, marketing activities, and personnel decisions for subsidiaries. Therefore, California argued, the state had taxed values clearly within its domain.[32] The Court reasoned that the formula employed in this case did not materially differ from other methods that had withstood constitutional challenge.[33] Thus, the three factor formula employed by California was constitutional.[34]

The Court also found that the State of California did not violate the foreign commerce clause of the United States Constitution.[35] Noting that the commerce cause requires that whatever tax system is adopted, it "must not result in double taxation,"[36] the Court held that California's tax was not a double tax.[37]

Over the years, courts have adopted a "one voice" standard in interpreting the foreign commerce clause.[38] This standard reflects the concern that "a state tax [might] 'impair federal uniformity in an area where federal uniformity is essential,' "[39] and ensures that the states are not making foreign policy which could affect the foreign policy of the United States government. The Court reasoned that the tax in question would not significantly affect foreign policy since the "legal incidence of the tax" fell only on a domestic corporation and did not create an "automatic 'asymetry'" in international taxation.[40] Even if foreign governments had an interest in lowering the tax burdens of domestic corporations, the Court noted that California could tax them in some other form or at higher rates.[41]

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not all—purposes as if it were an independent entity dealing at arm's length with the jurisidictions in which it operates and only for the income it realizes on its own books. 103 S. Ct. at 2950.

[31]103 S. Ct. at 2945.

[32]*Id.* at 2947.

[33]*Id.* at 2950.

[34]Container Corp. could only demonstrate a 14% difference in California's method and the method it utilized. *Id.*

[35]*Id.* at 2950-57.

[36]*Id.* at 2955.

[37]*Id.* at 2954.

[38]*Id.* at 2951.

[39]*Id.* (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).

[40]*Id.* at 2955, 2956 (emphasis omitted).

[41]The Court also found that the tax was not preempted by federal law because no treaties contemplated state taxes, Congress had not enacted contrary legislation, and federal tax statutes did not preempt the field. *Id.* at 2955-57.

Another case involving state taxation was *Westinghouse Electric Corp. v. Tully*.[42] In that case, Westinghouse argued that New York's taxation scheme for Domestic Sales International Corporations (DISC's) was discriminatory and in violation of the commerce clause[43] of the Constitution.[44]

The Revenue Act of 1971,[45] amending the Internal Revenue Code of 1954,[46] provided tax incentives to U.S. firms to export goods to other countries.[47] A firm qualifying for DISC status could remove fifty percent of its tax liability and defer its remaining liability. The first half of a DISC's net income, whether actually distributed or not, was to be treated as if it had been distributed to shareholders.[48] The tax on the remaining fifty percent was deferred until actually distributed, or until the firm no longer qualified as a DISC.[49]

The New York legislature enacted a law taxing the parent corporations of subsidiaries qualifying as DISC's.[50] This provision was made in response to a finding that if New York did not tax these corporations, the state would suffer annual revenue loses of $20-30 million.[51] To encourage business activity in New York, the law provided for an offsetting tax credit of thirty percent of a DISC's income.[52] The computation of the credit resulted in the allowance of a credit for DISC income derived from business done in New York but not for DISC income derived from other states.[53]

The Court found this credit scheme in violation of the commerce clause.[54] It explained that this tax credit discriminated in favor of New York businesses and, therefore, "forecloses tax-neutral decisions."[55] The Court offered examples which compared the tax liability of DISC's doing more business from New York with those doing less, finding discriminatory treatment in all cases.[56]

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[42]104 S. Ct. 1856 (1984).

[43]U.S. CONST. art. I, § 8, cl. 3.

[44]*Westinghouse*, 104 S. Ct. at 1861.

[45]26 U.S.C. § 1-7801 (1982).

[46]26 U.S.C. § 501-5-7 (1982).

[47]*Westinghouse*, 104 S. Ct. at 1858.

[48]*Id.* at 1859.

[49]*Id.*

[50]*Id.* at 1859-60. The budget analyst also cautioned "that state taxation of DISCs would discourage their formation in New York and also discourage the manufacture of export goods within the State." *Id.* at 1860 (citation omitted).

[51]*Id.* at 1860.

[52]*Id.*

[53]*Id.* at 1863-65.

[54]*Id.* at 1868.

[55]*Id.* at 1867 (quoting Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 331 (1977)).

[56]*Id.* at 1863 n.9.

In *Verlinden B.V. v. Central Bank of Nigeria*,[57] the United States Supreme Court held that under the jurisdiction provision of the Foreign Sovereign Immunities Act of 1976,[58] a federal court has both personal and subject matter jurisdiction in civil actions by foreign plaintiffs against foreign sovereigns under the appropriate circumstances. The plaintiff, a Dutch corporation, entered into a contract for the purchase of cement with the Federal Republic of Nigeria. The contract required payment for the cement to be made through a confirmed letter of credit issued by Morgan Guaranty Trust Company. An instrumentality of Nigeria, the Central Bank of Nigeria was responsible for obtaining the letter of credit, yet the defendant improperly established an unconfirmed letter of credit.[59] Subsequently, the plaintiff brought an action for anticipatory breach of the letter of credit.[60]

Upon the defendant's motion to dismiss, the district court held that it had subject matter jurisdiction over the case under the Foreign Sovereign Immunities Act of 1976, but dismissed the case because of a lack of personal jurisdiction.[61] The Second Circuit Court of Appeals affirmed the district court's dismissal but on different grounds.[62] It held that "neither the Diversity Clause nor the 'Arising Under' Clause of Art. III [of the United States Constitution] is broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns . . . ,"[63] concluding that Congress was without power to grant jurisdiction in this case.[64]

The United States Supreme Court reversed, holding that the scope of article III of the Constitution was not exceeded by permitting a foreign plaintiff to sue a foreign sovereign in a United States federal court because the "arising under" clause empowered the courts to exercise subject matter jurisdiction in such situations.[65] Congress can decide "whether and under what circumstances" a foreign nation will be amenable to suit in the courts of the United States by reason of its authority over foreign commerce and foreign relations.[66] Thus, the Court noted, the Foreign Sovereign Immunities Act was not only a jurisdictional statute but a substantive law, as the Act was an exercise of the congres-

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[57]461 U.S. 480 (1983).
[58]461 U.S. at 486-92. *See* 28 U.S.C. § 1330 (1982).
[59]461 U.S. at 482.
[60]*Id.* at 483.
[61]*Id.* at 485 n.5. *See* 28 U.S.C. § 1330 (1982).
[62]647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983).
[63]461 U.S. at 485 (footnotes omitted).
[64]*Id.*
[65]*Id.* at 492.
[66]*Id.* at 493 (citations omitted).

sional power to regulate foreign commerce.[67] Reviewing the Act's legislative history, the Court concluded that Congress did not intend to limit jurisdiction under the Act to actions brought by American citizens.[68]

Another important international law case decided by the United States Supreme Court during the 1983-84 term was *First National City Bank v. Banco Para El Comercio Exterior De Cuba*.[69] First National City Bank (now Citibank) issued a letter of credit for a Canadian sugar importer in favor of the respondent (Bancec). Bancec assigned the letter of credit to Cuba's central bank.[70] The sugar was delivered and the Cuban National Bank applied to Citibank for payment. Not long thereafter, Cuba nationalized all of Citibank's assets in Cuba.[71] Bancec brought a diversity action to recover on the letter of credit. In its answer, Citibank sought to setoff the expropriated funds against the amount of the letter of credit.[72]

After it filed the lawsuit, Bancec was dissolved by Cuba and its assets were transferred to various branches of the Ministry of Foreign Trade including the Cuban National Bank.[73] Bancec argued that its claim was being brought in its capacity as an independent juridical entity. And as a result, it asserted, it was not responsible for the acts of the Cuban government.[74] Citibank counterclaimed, arguing that Bancec was an instrumentality of the Cuban government and therefore Citibank was entitled to a setoff.[75]

The district court concluded that Bancec was an alter ego of the Cuban government, dismissed Bancec's claim, and permitted Citibank to exercise a setoff.[76] The Second Circuit Court of Appeals reversed, finding that Bancec was not an alter ego of the Cuban government.[77]

The questions brought before the United States Supreme Court included which body of law should control in determining whether a party is a juridical entity separate from a foreign government; whether Bancec was a separate juridical entity in this case; and, whether Citibank

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[67]*Id.* at 496-97. "The Act . . . does not merely concern access to the federal courts. . . . The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law . . . ." *Id.* (citations omitted).

[68]*Id.* at 489-90.

[69]103 S. Ct. 2591 (1983).

[70]*Id.*

[71]*Id.*

[72]*Id.*

[73]*Id.* at 2594.

[74]*Id.* at 2595.

[75]*Id.* at 2596.

[76]Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412 (S.D.N.Y. 1980), *rev'd*, Banco Para elk Comercio Exterior de Cuba v. First National City Bank, 658 F.2d 913 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

[77]658 F.2d. 913 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

could assert a setoff against a foreign government which brought suit in the courts of the United States.[78]

The Court applied principles of both international law and federal common law in deciding whether a party is a separate juridical entity.[79] The Court observed that giving conclusive effect to the laws of the chartering state to determine the status of its instrumentalities would "permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts."[80] Neither international law nor federal law allows a foreign government to file a claim yet be immune from counterclaim.[81] As to Bancec, the Supreme Court specifically held that it could not be treated as a separate entity:

> Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets—a seizure previously held by the Court of Appeals to have violated international law. We decline to adhere blindly to the corporate form where doing so would cause such an injustice.[82]

Justice Stevens, in a separate opinion, concurred in the result as far as permitting a United States citizen to bring a counterclaim against a foreign government. He dissented, however, on the ground that it was not clear from the facts that Bancec actually was not a separate entity.[83]

The United States Supreme Court further outlined the "minimum contacts" requirements for in personam jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[84] That case involved a wrongful death action brought in Texas against a Columbian corporation. Helicopteros had contracted with a pipeline joint venture to provide transportation of equipment and employees to pipeline sites in Peru.[85] This wrongful death suit was initiated after a helicopter owned by Helicopteros crashed in Peru, resulting in the deaths of four American employees of the joint venture.[86]

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[78] 103 S. Ct. at 2591.

[79] *Id.* at 2598.

[80] *Id.* at 2597 (footnote omitted).

[81] *Id.* at 2602.

[82] *Id.* at 2603 (footnote & citations omitted).

[83] *Id.* at 2604 (Justice Stevens would have remanded the case for more evidence on that issue.)

[84] 104 S. Ct. 1868 (1984).

[85] *Id.* at 1870.

[86] *Id.*

The Texas court based its jurisdiction on the fact that Helicopteros sent its chief executive officer to Houston to negotiate the contract, purchased approximately eighty percent of its fleet of helicopters in Fort Worth, sent several employees to the manufacturer in Fort Worth for orientation and training, and accepted into its New York and Florida bank accounts checks drawn on a Houston bank.[87]

The United States Supreme Court, reversing the Supreme Court of Texas, held that these contacts were insufficient to give Texas jurisdiction over the defendant because they did not satisfy the requirements of the due process clause of the fourteenth amendment.[88] The United States Supreme Court relied on *Rosenburg Brothers & Co. v. Curtis Brown Co.*[89] which stated, "'Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction . . . .'"[90] The Court deemed Helicopteros' contacts with Texas to be no more significant than those in *Rosenburg*.[91] Perhaps significantly, the Court took notice of the fact that the contract had been executed in Peru and not in Texas.[92]

2. Decisions of the Federal Courts of Appeals.—a. Antitrust.—In *Associated-Container Transportation (Australia) Ltd. v. United States*,[93] the United States Justice Department issued civil investigative demands (CID's) to numerous corporations for possible antitrust violations.[94] Some of the corporations sought an order to set aside portions of the Justice Department's investigation seeking information relating to particular conversations with the United States Federal Maritime Commission and various governmental agencies of Australia and New Zealand.[95] The plaintiffs relied on the Noerr-Pennington doctrine[96] and the act-of-state

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[87] *Id.*

[88] *Id.* at 1874.

[89] 260 U.S. 516 (1923), *overruled*, Helicopteros Nacionales de Columbia, S.A. v. Hall, 104 S. Ct. 1868 (1984).

[90] 104 S. Ct. at 1874 (quoting Rosenburg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 518 (1923)). *See supra* note 89.

[91] 104 S. Ct. at 1874.

[92] *Id.* at 1870.

[93] 705 F.2d 53 (2d Cir. 1983).

[94] These demands were issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 to -14 (1982).

[95] 705 F.2d at 56.

[96] *See* United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1965). The *Noerr-Pennington* doctrine grants immunity from the Sherman Act, 15 U.S.C. § 1 (1982), for legitimate efforts to influence public officials even if the purpose is anticompetitive. Associated-Container argued that its communications with the Federal Maritime Commission, in an attempt to get approval of certain shipping agreements, were protected from disclosure. 705 F.2d at 59.

doctrine[97] to argue that the communications were protected from disclosure.

The Second Circuit Court of Appeals determined that the corporations were not facing formal charges, and thus could not rely on the Noerr-Pennington doctrine. Generally, that doctrine protects businesses from prosecution, but not necessarily from investigation.[98] Accordingly, the court held that at this particular stage of the proceeding, the doctrine did not preclude enforcement of the CID's. Similarly, it determined that the investigation in question would not constitute an inquiry proscribed by the act-of-state doctrine, as it was not an inquiry into the validity of the public acts of a sovereign.[99] The court of appeals noted that this case did not require it to judge the legitimacy of the actions; rather, the court simply decided that the federal government had demonstrated it had a reason to believe the requested information was relevant. As a result, the act-of-state doctrine did not prevent the court from enforcing the CID's.[100]

Another significant case involving antitrust was *In re Japanese Electronic Products Antitrust Litigation*.[101] Zenith Radio Corporation and National Union Electronics brought an action against twenty-four Japanese electronics manufacturers and their United States subsidiaries for alleged violations of the Sherman Antitrust Act,[102] the Clayton Act,[103] the Robinson-Patman Act,[104] and the Wilson Tariff Act.[105]

The plaintiffs claimed that the Japanese defendants had conspired to reduce competition in Japan by maintaining price ceilings, and in the

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[97]The act-of-state doctrine "preludes the courts of this country from inquiring into the validity of the public acts a recognized sovereign power committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964), *quoted in Associated-Container*, 705 F.2d at 60.

[98] The court also noted that only until the Antitrust Division of the Justice Department was permitted to exercise its investigative authority could it be determined whether the antitrust laws had even been violated, or whether the *Noerr-Pennington* doctrine immunized the appellees' conduct. 705 F.2d at 60.

[99]*Id.* at 62. The act-of-state doctrine "is a function of our system of separation of powers and as such has 'constitutional underpinnings.' " Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 708 (1984) (citation omitted). The doctrine was first set forth 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." *Id.*

[100]705 F.2d at 61.

[101]723 F.2d 238 (3d Cir. 1983).

[102]15 U.S.C. §§ 1, 2 (1982).

[103]15 U.S.C. § 18 (1982).

[104]15 U.S.C. § 13(a) (1982).

[105]15 U.S.C. § 8 (1982).

United States, by requiring that each alleged conspirator have no more than five American customers.[106] The district court granted summary judgment in favor of the defendants.[107] The Third Circuit Court of Appeals reversed, finding that the district court had excluded significant items of evidence, and that there was sufficient evidence to raise a genuine issue of material fact as to the claims involving the Sherman, Clayton, and Wilson Tariff Acts.[108] The court of appeals affirmed summary judgment as to one of the Robinson-Patman Act claims, as that Act only proscribes price discrimination involving sales for use in the United States.[109] In addition, summary judgment in favor of the Sony Corporation, one of the five Japanese electronic companies, was upheld because there was no evidence that it was part of an agreement to maintain Japanese prices at a high level.[110] Summary judgments in favor of Motorola and Sears were also affirmed because there was no legally sufficient evidence establishing anticompetitive behavior.[111] Finally, the court held that Zenith and National Union Electric were entitled to injunctive relief under the Clayton Act during the pendency of the litigation.[112]

b. Antidumping.—Antidumping principles were also at issue in *In re Japanese Electronics Products Antitrust Litigation*.[113] In that case, the plaintiffs maintained that all of the defendants violated the Antidumping Act of 1916[114] which in part provides:

> It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles . . . in the principal markets of the country of their production . . . . *Provided*, that such act or acts be done with the intent of destroying or injuring an industry in the United States . . . .[115]

As in the antitrust portion of the case, the lower court granted summary judgment in favor of the defendants after excluding many relevant items

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[106]723 F.2d at 308-10.

[107]Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1190 (E.D. Pa. 1980).

[108]723 F.2d 306-10.

[109]*Id.* at 316-17.

[110]*Id.* at 313.

[111]*Id.* at 311-13.

[112]*Id.* at 318.

[113]723 F.2d 319 (3d Cir. 1983).

[114]15 U.S.C. § 72 (1982).

[115]*Id.*

of evidence.[116] The court of appeals held that the evidence, which had been erroneously excluded in the antitrust case, was sufficient to raise a genuine issue of material fact as to the dumping claims and reversed.[117] Summary judgments in favor of Sony, Motorola, and Sears were affirmed for reasons similar to the rationale in the antitrust cases.[118] The court in *In re Japanese*, expressly held that the Treaty of Friendship, Commerce and Navigation[119] did not prevent a claim under the Antidumping Act.[120] This treaty prohibits discrimination between domestic and imported products only in matters "'affecting internal taxation, sale, distribution, storage and use.'"[121] It does not, however, restrict the United States from its power to regulate imports; and article XIV(4) of the treaty permits either party to impose restrictions on unfair trade practices.[122]

In addition, the defendants argued that the Antidumping Act was void for vagueness. They alleged that "application of the 1916 Act to products possessing . . . technical differences . . . makes [that] statute unconstitutionally vague."[123] The court rejected the defendants' vagueness argument, holding the language found in the Act was not so vague as to make it unconstitutional on its face.[124] It determined that the elements of a violation of the Act were described with the required "'reasonable degree of certainty.'"[125] Those elements include: (1) the products must be comparable; (2) the products must be sold at a lower price in the United States than in the country of origin; and, (3) sales must be made with the intent to injure or destroy a United States industry.[126] The court decided that there was sufficient evidence to establish the existence of the elements referred to in the Act, and to raise a genuine issue of material fact sufficient to reverse a summary judgment.[127] This case will bear watching in the future as a possible guide for the application of the Antidumping Act against Japanese and other foreign companies.

The Zenith Corporation was involved in another lawsuit in which dumping by Japanese manufacturers of televisions was alleged. In *Zenith Radio Corp. v. United States*,[128] Zenith sought "a preliminary injunction

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[116]723 F.2d at 328.

[117]*Id.* at 328-30.

[118]*Id.*

[119]Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, art. XVI, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

[120]723 F.2d at 323.

[121]*Id.* at 323-24 (quoting article XVI of the treaty).

[122]*Id.* at 324.

[123]*Id.* at 326.

[124]*Id.*

[125]Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952), *quoted in In re* Japanese Electronics Products Antitrust Litigation, 723 F.2d at 326.

[126]723 F.2d at 324, 327.

[127]*Id.*

[128]710 F.2d 806 (D.C. Cir. 1983).

to prevent liquidation of entries of certain television receivers subject to dumping duties."[129] The lower court denied Zenith's request for a preliminary injunction on the sole ground "that Zenith failed to show that it [would] suffer irreparable harm in the absence of an injunction."[130]

On appeal, the Court of Appeals for the Federal District reversed and remanded. It observed that although the district court was not compelled to issue an injunction, the lower court failed to address other requirements for an injunction, such as the balance of hardships on all the parties, whether or not the public interest would be better served by the injunction, and the likelihood of success on the merits.[131] The court maintained that Zenith had an interest in maintaining its ability to compete in the television industry. It found that the Japanese importers were engaged in dumping activities in the United States market, holding that such activity does have an ill effect on American manufacturers.[132] Thus, Zenith would have been irreparably harmed if it could not preserve the entries pending litigation of the claim that the annual review was incorrect, since no other relief was available.[133]

Procedures for assessing dumping duties on Japanese television importers were also at issue in *Committee to Preserve American Color Television v. United States.*[134] Upon learning that the Secretary of Commerce had reached an agreement with Japanese television importers to compromise claims for dumping duty assessments, the Committee to Preserve American Color Television (COMPACT) sued to enjoin implementation of the compromise.[135] COMPACT argued that the Secretary of Commerce had no authority to compromise such claims, and even if he did possess such authority, he exercised bad faith in making this particular compromise.

The court noted that at one time, it was the Secretary of the Treasury who had the authority to compromise claims under section 617 of the Tariff Act of 1930.[136] However, in 1979, that authority was transferred to the Secretary of Commerce.[137] COMPACT also argued that the Secretary's recommendations, which underestimated the maximum amount of duties the government could collect, were evidence of his bad faith.

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[129]*Id.* at 807. The planned liquidation was the result of an annual review of such duties by the International Trade Administration. Such reviews establish the margins used to determine the following year's dumping duties. *Id.* at 808.

[130]*Id.* at 807.

[131]*Id.* at 809.

[132]*Id.* at 810-11.

[133]*Id.* at 811.

[134]706 F.2d 1574 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 96 (1983).

[135]*Id.* at 1576.

[136]19 U.S.C. § 1617 (1982).

[137]Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273, 69,275 (1979), *reprinted in* 93 Stat. 1381 (1979).

Yet the court rejected this argument, and affirmed the lower court decision.[138]

Japanese manufacturers were the subject of yet another dumping suit in *Smith-Corona Group v. United States*.[139] Smith-Corona challenged the methods of computing certain adjustments to dumping duties imposed on Japanese makers of typewriters. It argued that the methods used were inconsistent with the requirements of the Trade Agreements Act of 1979.[140] Smith-Corona contended that costs should not be used in determining allowances, but that "differences in *price* or *value* must be [the factors that are] due to differences in circumstances of sale."[141] In addition, Smith-Corona argued that the "exporter's sales price offset" found in a Department of Commerce regulation was invalid because it contravened the adjustments provided for in the Trade Agreements Act.[142]

Employing a liberal construction to the Trade Agreements Act, the court of appeals recognized in the Secretary of Commerce a "broad discretion in making adjustments,"[143] and neither the language of the Act nor its legislative history excluded using the cost method to make adjustments.[144] Indeed, the court noted that the cost method might be the most efficient method, in view of statutory requirements for a speedy determination.[145] The court upheld the "exporter's sales price offset" because it merely took into account selling expenses incurred in selling within the United States. As such, it was "a proper and reasonable exercise of the Secretary's authority to administer the statute fairly."[146]

Finally, Smith-Corona challenged certain adjustments made for the differences in the products' physical characteristics. The products sold in Japan included accessories and instruction pamphlets that were not included with the products sold in the United States. Smith-Corona argued that these differences should not constitute differences in the physical characteristics of the products when determining the *value* of the merchandise. Yet the court found that because the accessories sold with the Japanese typewriters, like replacement ribbons and instructional handbooks, were not commonly sold with United States typewriters, it was reasonable to find the values between the two different.[147]

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[138]706 F.2d at 1578-79.

[139]713 F.2d 1568 (D.C. Cir. 1983).

[140]19 U.S.C. § 1673 (1982). *See* 713 F.2d at 1571-73 nn. 7-11.

[141]713 F.2d at 1574 (footnote omitted)(discussing 19 C.F.R. § 353.15(d) (1980)).

[142]*Id.* at 1574 (discussing 19 C.F.R. § 353.15(c) (1980)). *See also infra* note 163.

[143]713 F.2d at 1577.

[144]The court did caution, however, that the Secretary could not "rely on cost *to the exclusion* of its effect on value." *Id.*

[145]*Id.* at 1577 n.27.

[146]*Id.* at 1579.

[147]*Id.* at 1582.

In *United States v. Roses, Inc.*,[148] certain procedures under the Trade Agreements Act as administered by the International Trade Administration (ITA) were challenged. The plaintiff filed a petition with the ITA seeking "assessment of antidumping duties against the importation of fresh cut roses" by Columbian rose growers.[149] During the twenty day period in which the ITA had to make a determination whether or not an investigation was warranted, officials from the ITA met with the Columbian Embassy and the Columbian Rose Growers Association. During these meetings the plaintiff's petition was discussed, and objections thereto noted.[150] Two days later the ITA requested the plaintiff to withdraw his petition or it would be dismissed. The plaintiff then filed suit in the Court of International Trade (CIT), seeking to set aside the initial negative determination and for an order to compel the ITA to commence an investigation. The lower court found in favor of the plaintiff and the ITA appealed.[151]

ITA argued that it had made its decision not to investigate based upon evidence from sources other than Columbian officials, and that the CIT could not order ITA to conduct an investigation.[152] The court of appeals took note of the assumption of governmental regularity that the ITA was seeking to invoke, in order to prove that it had not relied on the "evidence [it had] illegitimately obtained"[153] in arriving at its decision. The court went on to recognize, however, that the presumption actually worked to the ITA's disadvantage: "If it appears irregular, it is irregular, and the burden shifts to the proponent to show the contrary."[154]

The court next examined the question of whether or not the CIT erred in ordering the ITA to investigate. The court reviewed the statute's legislative history and recognized that the agency was given broad discretion and authority to determine when an investigation was proper. The court found that Congress intended the agency's expertise to determine whether or not circumstances warranted an investigation.[155] Therefore, the court held that even when an agency employs procedures "tainted by illegality . . . it must . . . be an abuse of authority for a CIT judge to substitute his own opinion for that of the agency."[156]

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[148]706 F.2d 1563 (D.C. Cir. 1983).

[149]*Id.* at 1564. "Roses Incorporated is a trade association of domestic rose growers . . . ." *Id.*

[150]*Id.*

[151]*Id.* at 1565.

[152]*Id.* at 1566, 1568.

[153]*Id.* at 1567.

[154]*Id.*

[155]"[I]t would be absurd and inconsistent to say an outside party could compel an investigation the agency knew of its own knowledge would be unwarranted." *Id.* at 1568.

[156]706 F.2d at 1569.

Remanding the case for further proceedings, the court of appeals did observe, however, that investigators other than those who met with Columbian officials should be utilized.[157]

c. Taxation and standing of foreign corporations.—California's "unitary tax" was the subject of litigation at the federal court of appeals level in *Shell Petroleum, N.V. v. Graves.*[158] Shell Petroleum, N.V. was a Netherlands corporation owning sixty-nine percent of Shell Oil Company, a Delaware corporation. Shell Oil Company, in turn, owned two corporations doing business within and from California.

Shell Petroleum sought declaratory and injunctive relief to prevent an assessment of taxes under California's method of computation.[159] It argued that the unitary tax formula would produce a "gross disproportion" between the income attributable to the California corporations and their actual income.[160] The court of appeals upheld a dismissal of Shell Petroleum's claim for lack of ripeness and standing. Shell argued it had standing because of its national status under the Treaty of Friendship, Commerce and Navigation.[161] The court, however, found the treaty only granted Shell Petroleum the same rights as a domestic shareholder. By the court's analysis, Shell, as a shareholder, had not been "injured directly and independently of the corporation," and therefore, could not sue for injury to the California corporations in which it had an interest.[162]

As for the ripeness issue, Shell argued that although administrative hearings regarding the tax assessments in question had just begun, most of the information would have to come from it, the principal stockholder. The court rejected this argument; quoting the lower court, the court of appeals relied on policies underlying the Tax Injunction Act[163] to hold that Shell's action was not yet ripe. The court found other administrative and state court remedies could be pursued, and therefore the district court's dismissal was affirmed.[164]

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[157]*Id.* at 1571.

[158]709 F.2d 593 (9th Cir. 1983), *cert. denied sub nom.* Shell Petroleum N.V. v. Franchetti, 104 S. Ct. 537 (1983).

[159]First, "the Board determines which operations . . . are sufficiently integrated in the production of overall corporate income to warrant 'unitary' treatment." 709 F.2d at 595. Second, ratios are computed based on the taxpayer's total property, payroll, and sales values in California compared to the same items of the unitary business throughout the world. Third, "The average of the ratios is then applied to the worldwide net income of the unitary business to determine the taxpayer's income in California for tax purposes." *Id.*

[160]*Id.*

[161]Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942. *See* 709 F.2d at 595 n.1.

[162]709 F.2d at 595.

[163]28 U.S.C. § 1341 (1982). *See* 709 F.2d at 597.

[164]709 F.2d at 596-99.

d. Patent and trademark.—The year 1983 was not an especially prolific year for international patent and trademark litigation. A case of some note, however, is *Schaper Manufacturing Co. v. United States International Trade Commission.*[165] There, the owner of a toy patent sued for infringement of its patent, and sought review of an ITC order terminating an investigation of unfair trade practices proscribed by the Tariff Act of 1930.[166] That Act makes illegal any trade practices which would "destroy or substantially injure an industry, efficiently and economically operated . . . in the United States."[167] The plaintiff maintained that the defendant had imported copies of the patented design without permission in violation of the Act.[168]

The court of appeals ruled that without any production in the United States, there is no "industry" as defined by the legislative history of the Act. Therefore, there was no destruction of the industry and no violation of the Act.[169] Although Schaper Manufacturing was a licensee of the patent holder, its manufacturing was performed by a Hong Kong corporation in Hong Kong. By the court's analysis, the design of the toys and the unpatented design of the accessories alone did not constitute production.[170] Therefore, where a corporation has its manufacturing operations, quality control, and most of its packaging performed abroad, it can not be deemed to have produced the product, and it is not covered by the Act as a protected "industry."[171]

A significant case relating to the extraterritorial reach of the Lanham Trademark Act[172] was *American Rice, Inc. v. Arkansas Rice Growers Cooperative Association.*[173] American Rice used a logo on bags of rice it sold in Saudi Arabia,[174] and on which it owned a United States trademark. The logo depicted a young girl eating rice and employed the colors of red, green, and yellow. Beginning in 1974, the Arkansas Rice Growers Cooperative also began to sell rice in Saudi Arabia under a similar logo and using the same colors.[175]

In 1981, American Rice filed suit charging Arkansas Rice Growers with trademark infringement under the Lanham Act.[176] After American Rice obtained permanent injunctive relief, Arkansas Rice Growers ap-

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[165]717 F.2d 1368 (D.C. Cir. 1983).
[166]19 U.S.C. § 1337 (1982).
[167]*Id.*
[168]717 F.2d at 1369.
[169]*Id.* at 1372.
[170]*Id.* at 1371-73 & n.7.
[171]*Id.*
[172]15 U.S.C. §§ 1051 to 1150 (1982).
[173]701 F.2d 408 (5th Cir. 1983).
[174]American Rice was the market leader in Saudi Arabian rice sales. *Id.* at 410.
[175]*Id.* at 411.
[176]15 U.S.C. § 1051 (1982).

pealed, arguing that the trial court did not have jurisdiction over the use of trademarks in Saudi Arabia. The court of appeals referred to *Steele v. Bulova Watch Company*,[177] in which the United States Supreme Court held that the Lanham Act has extraterritorial reach over the acts of American citizens that constitute unfair competition, even if consummated in a foreign country.[178] The court of appeals, in determining whether or not jurisdiction should have been asserted, looked to whether or not the defendant was a citizen or resident of the United States; the effect, if any, on the commerce of the United States; and whether or not there was a conflict with foreign laws.[179] The court, finding all three factors present, held that the district court did not err in asserting jurisdiction over the defendant.[180]

American Rice Growers also argued that the doctrine of forum non conveniens should prevent jurisdiction by a court of the United States. Rejecting this argument, the court held that because no alternative forum existed in Saudi Arabia, and the law of the United States was the governing law in this case, the United States was an appropriate forum.[181]

e. Sovereign immunity.—The full effect of the Foreign Sovereign Immunities Act of 1976 (FSIA)[182] has yet to be determined. However, decisions handed down during this survey period provided some clarification of the Act. In *Ministry of Supply, Cairo v. Universe Tankships, Inc.*,[183] the Second Circuit Court of Appeals ruled that sovereign immunity does not bar a cross-claim if it can be shown that the commercial activities exception of the FSIA[184] is applicable. Under this section, sovereign immunity is withdrawn when a cause of action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[185]

In *Universe Tankships*, the Ministry of Supply of Cairo filed suit alleging damage to a shipment of grain it had ordered. Soon thereafter, Babanaft International Company was permitted to intervene as both a claimant and a cross-claimant against the plaintiff. Babanaft complained it lost time under its time charter, resulting from an order by the Ministry to delay unloading the grain for two weeks. The district court dismissed

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[177]344 U.S. 280 (1952).

[178]*Id.* at 281, *discussed in* 701 F.2d at 413.

[179]701 F.2d at 414. The court noted, however, that these factors were not exclusive. Rather, these factors should be the "primary elements in any balancing analysis." *Id.*

[180]*Id.* at 414-16.

[181]*Id.* at 417.

[182]28 U.S.C. §§ 1330, 1332(a)(2) to 1332(a)(4), 1391(f), 1441(d), 1602 to 1611 (1982).

[183]708 F.2d 80 (2d Cir. 1983).

[184]28 U.S.C. § 1605(a)(2).

[185]*Id.*

Babanaft's cross-claim because of the sovereign immunity of the Ministry, and Babanaft appealed.[186]

The district court had looked only at a small part of the pertinent statute, and concluded that the length of time it took the plaintiffs to discharge a ship had "no 'direct effect' in this country,"[187] and therefore sovereign immunity protected plaintiff from Babanaft's cross-claim. On review, the court of appeals looked at the entire section involving exceptions to sovereign immunity. It found that the district court failed to take note of the section in which immunity was withdrawn. That section provides an exception to sovereign immunity whenever a cause of action is based on a commercial activity carried on in the United States by a foreign country. The court determined that if the acts in question were an "integral part of the state's 'regular course of commercial conduct . . . having substantial contact with the United States'" then immunity should be withdrawn.[188] Examining the legislative history, the court noted that even as little commercial contact as "'receiv[ing] financing from a private or public lending institution located in the United States'" would be sufficient to satisfy the "substantial contact" standard and create an exception.[189] Babanaft's claim was based on the "plaintiffs' entire course of activity in arranging . . . for the purchase of the wheat and its transportation."[190] Thus, the court determined, because the Ministry had purchased the grain in the United States, sufficient commercial activity existed to invoke the exception.[191]

The Ministry countered by pointing out that Congress had made a special and separate exception for counter-claims, while not making one for cross-claims.[192] Thus, the Ministry argued that Congress had effectively prevented any exceptions to sovereign immunity for cross-claims.[193] The court rejected the Ministry's argument. It determined that the language in the statute, outlining exceptions to immunity, was broad enough to include cross-claims. Furthermore, the court could think "of no good reason why Congress should have wished to preserve sovereign immunity [in cross-claims] . . . while withdrawing that immunity" when a counter-claim is sought.[194]

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[186]708 F.2d at 83-84.

[187]*Id.* at 83.

[188]*Id.* at 84.

[189]*Id.* (quoting H.R. REP. No. 1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6615-16).

[190]708 F.2d at 84.

[191]*Id.*

[192]28 U.S.C. § 1607 (1982).

[193]708 F.2d at 86.

[194]*Id.*

In *S & S Machinery Co. v. Masinexportimport*,[195] the Second Circuit Court of Appeals was asked to determine whether or not a foreign trading company and a Romanian bank were agencies or instrumentalities of a foreign state, and thus immunized from a prejudgment attachment. S & S Machinery bought several Romanian-made lathes, drills, and machine parts from Masinexportimport (Masin). It was to pay for them with an irrevocable letter of credit in favor of the Romanian Bank for Foreign Trade, the collection agent for Masin.[196] When S & S accepted delivery of the machine tools, it objected to their quality. It then filed suit for damages in a lower state court and obtained a prejudgment attachment order to freeze the American assets of Masin and of the Romanian Bank for Foreign Trade.[197] The defendants successfully removed the action to federal court eventually obtaining dissolution of the attachment order. The district court determined that the defendants were agencies of the Romanian government, and therefore protected under the FSIA.[198]

S & S appealed the dissolution order, but the Second Circuit affirmed.[199] The court observed that the legislative history of the FSIA reveals that foreign trading corporations and central banks should be considered as agencies of a foreign state.[200] The court decided that there was sufficient evidence to demonstrate that the agencies in question were agencies of the state.[201]

S & S also argued that as a result of the waiver of immunity provision of the Agreement On Trade Relations Between the United States and the Romanian Governments, the defendants waived immunity

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[195]706 F.2d 411 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 161 (1984).

[196]706 F.2d at 412.

[197]*Id.*

[198]*Id.* at 413.

[199]*Id.*

[200]*Id. See* 28 U.S.C. § 1603(b) (1976). The legislative history explains the types of entities intended to be included as state agencies: "As a general matter, entitites which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation . . . a central bank, [or] an export association . . . ." H.R. REP. No. 1487, 94th Cong., 2d Sess. 15-16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6614, *quoted in S&S Machinery*, 706 F.2d at 414.

[201]The controlling clause provides in part:

> Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts, and, when applicable, to administrative bodies . . . . They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions, except as may be provided in other bilateral agreements.

706 F.2d at 417-18 (quoting Agreement on Trade Relations Between the United States and the Romanian Government, Apr. 2, 1975, art. IV, 26 U.S.T. 2305, 2308-09, T.I.A.S. No. 8159, at 2.).

to prejudgment attachments.[202] In reply, the court held "that the waiver of immunity from 'other liability' does not explicitly waive immunity from prejudgment attachment."[203] Finally, the court affirmed the district court's dissolution of an injunction preventing negotiation of the letters of credit. It held that courts could not grant injunctive relief to do something they could not do by attachment.[204]

The Seventh Circuit examined the counter-claim and expropriation exceptions to immunity under the FSIA in *Alberti v. Empresa Nicaraguense De La Carne*.[205] Alberti and Albert International, Inc. were thirty-five percent shareholders of Empacadora Nicaraguense, S.A., before Nicaragua nationalized Empacadora in 1979. The plaintiffs estimated their stock was worth $1,163,630.30 at the time of expropriation. Yet the plaintiffs never received any compensation for their interest in Empacadora. Following nationalization, Alberti International ordered $739,306.45 worth of frozen beef from ENCAR, the successor to Empacadora. The beef was delivered, but never paid for.[206] Instead, Alberti brought an action against Empresa for the wrongful conversion of his property, and sought a declaratory judgment empowering him to set off the purchase price of the beef against the value of his stock in his expropriated corporation. The district court dismissed and Alberti appealed.[207]

The Seventh Circuit Court of Appeals affirmed the dismissal on several bases. First, the court determined it lacked jurisdiction over the defendants because of improper service of process.[208] The FSIA requires service on the "head of the ministry of foreign affairs of the foreign state,"[209] and Alberti had served the Nicaraguan Ambassador. The court found that such a delivery did not meet the intentions of Congress, and as such was inadequate.[210] Second, the court held that the commercial activities exception to immunity[211] did not apply since the controversy

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[202]706 F.2d at 416-17. *See* Agreement on Trade Relations Between the United States and the Romanian Government, Apr. 2, 1975, art. IV, 26 U.S.T. 2305, 2308-09 T.I.A.S. No. 8159, at 2. In interpreting the term "or other liability" the court relied on the construction of identical language found in a treaty between the United States and Iran. 706 F.2d at 416-17.

[203]706 F.2d at 417.

[204]*Id.* at 418.

[205]705 F.2d 250 (7th Cir. 1983).

[206]*Id.* at 252.

[207]*Id.*

[208]*Id.* at 253.

[209]28 U.S.C. § 1608(a)(3) (1982). This section of the FSIA "establishes a federal long-arm statute for suits against foreign states, [and] delineates the 'exclusive procedures' for effecting service of process upon a foreign state." 705 F.2d at 253.

[210]705 F.2d at 253.

[211]*See supra* notes 188-91 and accompanying text. *See also* 28 U.S.C. § 1605(a)(2) (1982).

underlying the cause of action was the wrongful conversion of Alberti's property, not Alberti's obligation to pay for the beef. Thus, there was no commercial activity to place this case within the FSIA's exceptions. Third, it was determined that Alberti could not invoke the counter-claim exception in his suit for declaratory relief. Before this exception applies, the court held, he must be sued by Nicaragua.[212] Finally, the court rejected Alberti's argument that the court lacked jurisdiction under the FSIA provision that removes violations of international law from the protection of sovereign immunity. The court found that the exception did not apply unless it could be shown that the expropriation violated international law.[213] Because Alberti failed to answer the defendant's motion to dismiss, there was no evidence from which a violation of law was established. Therefore, the dismissal of Alberti's claim was affirmed.[214]

f. Jurisdiction.—For many years, United States courts have sought to define the extent of their extraterritorial jurisdiction in a variety of situations. For example, during the survey period the Fifth Circuit Court of Appeals determined that United States courts could exert extraterritorial jurisdiction in particular trademark infringement cases.[215]

Significant foreign jurisdictional issues were decided by the Court of Appeals for the Seventh Circuit in *Nelson ex. rel. Carlson v. Park Industries, Inc.*[216] Nelson, a minor, was burned when her cotton flannel shirt caught fire. United Garment Manufacturing Company (United), a Hong Kong corporation, had manufactured the shirt and delivered it to Bunnan Tong & Company, a Hong Kong distributor and the purchasing agent for the F.W. Woolworth Company (Woolworth). Eventually, Woolworth sold the shirt in a Wisconsin store to Nelson. Nelson filed suit and Bunnan and United filed motions to dismiss for lack of personal jurisdiction.[217] The district court granted their motions to dismiss. It determined that neither Bunnan nor United had sufficient contacts or relations with the State of Wisconsin, and that there was "no more than a mere likelihood"[218] that the shirt would even be sold in Wisconsin.[219]

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[212]705 F.2d at 254.

[213]*Id.* at 255.

[214]*Id.* at 256.

[215]American Rice, Inc. v. Arkansas Rice Growers Coop. Ass'n, 701 F.2d 408 (5th Cir. 1983). *See supra* notes 173-81 and accompanying text.

[216]717 F.2d 1120 (7th Cir. 1983), *cert. denied sub nom.* Bannon Tong & Co. v. F.W. Woolworth Co., 104 S. Ct. 1277 (1984).

[217]717 F.2d at 1122. *See* FED. R. CIV. P. 12(b)(2).

[218]717 F.2d at 1122.

[219]*Id.*

The court of appeals reversed the orders dismissing United and Bunnan. Applying the Wisconsin long arm statute,[220] the court found that both of the defendants had processed a product (the flannel shirt) which was used in the state in the ordinary course of trade. Rejecting Bunnan's argument, the court held that "process" did "include a distributor's purchase and sale of goods in the normal course of the distribution of those goods."[221]

Relying on *World-Wide Volkswagen v. Woodson*,[222] the court reasoned that when a defendant puts a product into the "stream of commerce" and it is foreseeable that the product will be sold or used in the foreign state, the foreign state will have personal jurisdiction over the defendant without offending due process.[223] Both Bunnan and United argued that they did not place the flannel shirt into the "stream of commerce" because each transaction between the parties was separate, and after the transactions neither had control over the goods.[224] The court rejected this argument:

> Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum's jurisdiction . . . because the manufacturer and primary distributor have intended to serve a [broad] market and they derive direct benefits from serving that market.[225]

In determining whether or not the Hong Kong defendants could have reasonably anticipated being "haled into court" in Wisconsin, the court reviewed the distribution system used by the defendants. It reasoned that it was sufficiently foreseeable to the defendants that Woolworth would market the shirts in Wisconsin since the parties had done business with each other for several years; the employees of the companies often visited each other's offices; and, the defendants knew that the shirts were sold at retail outlets throughout the United States.[226]

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[220] *Id.* at 1123-24 (quoting WIS. STAT. § 801.05(4)(b) (1981-82)). This section provides:

> In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury . . . [p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

WIS. STAT. ANN. § 801.05(4)(b) (1977).

[221] 717 F.2d at 1124 (footnote omitted).

[222] 444 U.S. 286 (1980).

[223] 717 F.2d at 1125 (citing 444 U.S. at 297-98).

[224] 717 F.2d at 1126.

[225] *Id.* at 1125-26 (citations omitted).

[226] *Id.* at 1126-27.

In a similar case, the Fifth Circuit Court of Appeals arrived at a different conclusion. *Talbot Tractor Co. v. Hinomoto Tractor Sales, USA*[227] was a suit brought by Talbott against Hinomoto for breaching an exclusive dealership contract at the inducement of Southern Tractor Corporation, a competing tractor distributor. Hinomoto and Southern sought to join Kameatsu-Gosho, Inc. (Kameatsu) as a third party defendant, "alleging that if there was a failure to meet their contractual obligations, . . . [Kameatsu] had caused the damages alleged by Talbot."[228]

The district court dismissed the claim against Kameatsu for want of personal jurisdiction in Louisiana. The court of appeals affirmed the trial court; noting that because Kameatsu was a national distributor importing tractors from Japan and delivering them to the Port of Houston for national distribution, it was not foreseeable to Kameatsu that such a claim would arise in Louisiana.[229] The court agreed with Kameatsu that it should not base personal jurisdiction over it on the basis of Hinomoto's contacts with Louisiana. It noted that Hinomoto and Southern did not allege that Kameatsu sold to Hinomoto for the purpose of penetrating the Louisiana market, and that, in fact, Kameatsu had limited its operations to Houston in order to avoid exactly this extension of personal jurisdiction.[230] Relying on *World-Wide Volkswagen*,[231] the court affirmed the dismissal for lack of personal jurisdiction.[232]

The Seventh Circuit Court of Appeals decided yet another case involving international parties and questions of jurisdiction in *In re Oil Spill by the Amoco Cadiz off the Coast of France*.[233] A group of French citizens sued Amoco for damages resulting from the negligent operation of its tanker; in addition, they sued Astilleros Espanoles, S.A., a Spanish corporation, for the negligent design of the ship.[234] Amoco filed a cross-claim for indemnification and a third party complaint against Astilleros, alleging the latter was primarily responsible for the damage.

The court rejected Astilleros' argument that it was not subject to the jurisdiction of the district court, since Astilleros had signed the contract to sell the ship in Chicago.[235] The court also determined there was jurisdiction over the claim of the French plaintiffs against Astilleros,

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[227]703 F.2d 143 (5th Cir. 1983).

[228]*Id.* at 144.

[229]*Id.* at 145.

[230]*Id.*

[231]444 U.S. 286 (1980).

[232]703 F.2d at 146-47.

[233]699 F.2d 909 (7th Cir. 1983), *cert. denied*, Astilleros Espanoles, S.A. v. Standard Oil Co., 104 S. Ct. 196 (1983).

[234]699 F.2d at 912.

[235]*Id.* at 916.

because a determination of whether the ship was used negligently depended upon the contract which was negotiated and accepted in Chicago. The court noted that it might seem odd that "the French [are] . . . suing the Spanish in a court in Chicago because of an oil spill off the French coast . . . ." Yet "[t]he additional hardship to Astilleros [could not be too] great and [was] outweighed by the advantages of consolidating all the claims."[236] With that, the court affirmed the default judgments against Astilleros.

In re Marc Rich & Co., A.G.[237] presented a more complicated jurisdiction issue. There, the Second Circuit Court of Appeals held that it had jurisdiction to enforce a subpoena duces tecum and a grand jury investigation of a Swiss corporation, finding there were sufficient contacts with New York. The Swiss corporation owned a wholly-owned subsidiary in New York. The grand jury was investigating the New York subsidiary for alleged diversion of $20,000,000 to its parent in an attempt to evade federal tax liability. The defendant, the parent Swiss corporation, refused to obey the subpoena because it said the court lacked personal jurisdiction.[238]

The court of appeals noted that a grand jury must make a prima facie showing that jurisdiction exists before it may subpoena a witness.[239] "A federal court's jurisdiction is not determined by its power to issue a subpoena; its power to issue a subpoena is determined by its jurisdiction."[240] Jurisdiction was present here because sufficient evidence demonstrated that federal tax laws had been evaded, hence the case was within the territorial principles of jurisdiction recognized by many countries.[241] The court also found that two of the five directors of the Swiss corporation were United States residents; the subsidiary was doing business in New York; and, at least one director was a participant in the tax evasion scheme; therefore, it was likely that some conspiratorial acts occurred in the United States.[242]

g. Letters of credit.—The letter of credit is basic to the financing of export sales worldwide. Yet they are complex and can involve many parties. This complexity was demonstrated in *Voest-Alpine International Corp. v. Chase Manhattan Bank*,[243] where an agency of the Indian

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[236]*Id.* at 917.

[237]707 F.2d 663 (2d Cir. 1983), *cert. denied*, 103 S. Ct. 3555 (1983).

[238]707 F.2d at 665.

[239]*Id.* at 670.

[240]*Id.* at 669 (citations omitted). The court also pointed out that the answer to the question before it was not in New York's long-arm statute: "[The Grand Jury's] right to inquire of appellant depends upon appellant's contacts with the entire United States, not simply the state of New York." *Id.* at 667 (citation omitted).

[241]*Id.* at 666.

[242]*Id.* at 668.

[243]707 F.2d 680 (2d Cir. 1983).

government entered into a contract to buy scrap steel from Voest, an Austrian corporation. The Bank of Baroda (India) issued letters of credit as the payment method for the sale. Originally, Chase was to act as an advisory bank and, as such, review documents submitted by Voest. Subsequently however, Chase became the confirming bank of the letters of credit. As a result, Chase committed itself to stand behind the letters of credit issued by the Bank of Baroda to the extent of its confirmation agreement with that bank.[244]

The scrap was loaded on a ship but never reached India as a result of a mutiny by the ship's crew. Notwithstanding the mutiny however, Voest submitted the verification documents to Chase which advised the Bank of Barada that the documents conformed to the requirements of the letter of credit, despite the "irreconcilable inconsistencies" contained in the documents. Baroda uncovered the inconsistencies and refused payment.[245] When Chase refused to honor the drafts upon presentment, Voest filed suit against Chase for wrongful dishonor. Voest claimed Chase had waived the right to demand strict compliance, and therefore wrongfully dishonored the demands.[246] The district court disagreed, and granted summary judgment against Voest.[247]

The court of appeals recognized the importance of strict compliance with the terms of such letters of credit.[248] It pointed out that requiring strict compliance often protects the bank carrying the absolute obligation: "Adherence to this rule ensures that banks, dealing only in documents, will be able to act quickly, . . . [and] is also essential so as not to impose an obligation upon the bank it did not undertake . . . ."[249]

Chase argued that a waiver analysis was inappropriate since the documents had "incurable" defects. The appellate court rejected this, finding the question of whether a defect could be cured irrelevant, "for it is the right to demand an absence of defects that the party is deemed to have relinquished."[250] Applying New York law, the court held that a trier of fact could have concluded from the evidence presented by Voest that Chase had knowledge of his right and an intention to relinquish it. Therefore, "summary judgment was inappropriately granted."[251] The court of appeals also disagreed with the district court's finding that the

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[244]*Id.* at 683.

[245]*Id.*

[246]*Id.* at 684.

[247]*Id.* The district court also dismissed a third party claim filed by Chase against the Bank of Baroda for indemnification.

[248]"[A]ttempts to avoid payment premised on extrinsic considerations . . . tend to compromise their chief virtue of predictable reliability as a payment mechanism." *Id.* at 682 (citations omitted).

[249]*Id.* at 682-83.

[250]*Id.* at 685.

[251]*Id.*

evidence established that Voest did not commit fraud when it submitted papers not conforming to the letters' requirements.[252] Rather, it found a question of fact remaining, and remanded the question to trial. However, the court of appeals did point out that if it were established that Voest did commit fraud, Voest would be estopped from claiming any benefit accruing to it from its misconduct.[253]

h. Foreign corrupt practices act and the act-of-state doctrine.—The Foreign Corrupt Practices Act of 1977[254] was enacted to eliminate the payment of bribes to foreign officials as a condition precedent to doing business in certain countries. Yet the full power of this Act has not been tested.

In *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*,[255] Clayco argued that the act-of-state doctrine[256] should be abrogated by the Foreign Corrupt Practices Act.[257] The court recognized the purpose behind the doctrine—to prevent hindrance of the executive and legislative branches' conduct in foreign policy matters—and affirmed the district court's full application of the doctrine.[258] Next, the court of appeals turned to Clayco's attempts to create an exception to the doctrine. Significantly, Clayco claimed that the Act created an exception. It argued the enactment of the Act was an acknowledgment by Congress that our foreign relations would be better off with a strict antibribery statute. The court pointed out, however, that actions under the Act are public enforcement actions and brought under the wisdom of the Securities and Exchange Commission, the Justice Department, or the State Department.[259] Since this case was a private action rather than a public enforcement action, "the act of state doctrine remains necessary to protect the proper conduct of national foreign policy."[260] Thus, the court of appeals affirmed the dismissal.

i. Foreign banking litigation.—Regulations pursuant to the International Banking Act of 1978,[261] which permit the federal government to charter foreign banks in the United States, were challenged in *Con-*

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[252]*Id.* at 686.

[253]*Id.*

[254]15 U.S.C. §§ 78dd to 78dd-2 (1982).

[255]712 F.2d 404 (9th Cir. 1983).

[256]*See supra* note 100.

[257]Clayco charged Occidental with making secret payments to a foreign official in order to unlawfully obtain off shore oil concessions. 712 F.2d at 405. The district court dismissed the action based on the act-of-state doctrine. It held that plaintiff's burden of proof would require a review of "the ethical validity of the sovereign's conduct." *Id.* at 406.

[258]*Id.* at 406.

[259]*Id.* at 409.

[260]*Id.*

[261]12 U.S.C. §§ 3101, 3108 (1982).

ference of State Bank Supervisors v. Conover.[262] There, several New York state officials filed suit, alleging that the Comptroller erred in (1) approving applications for foreign banks to convert their state-licensed branches into federally licensed branches where state law prohibits such changes;[263] (2) permitting other foreign banks to open federal branches and conduct operations in violation of state law;[264] and, (3) permitting "federal agencies" to accept deposits from non-U.S. citizens or residents,[265] in violation of the Act.[266] The district court dismissed the suit and the plaintiffs appealed.[267]

The court of appeals held that the International Bank Act permits the Comptroller to charter a foreign bank in a particular state, so long as *all* foreign banks are not prohibited from operating in that state by state law.[268] The court referred to the Act's legislative history and found it to be ambiguous. As a result, it chose to construe section 4(a) of the Act[269] against the backdrop of congressional concern that the objective of the legislation was "to accord foreign banks national treatment, under which 'foreign enterprises . . . are treated as competitive equals with their domestic counterparts.'"[270] The court reasoned that "the establishment of a foreign bank's federally-chartered bank's *initial* home state office is analogous to the establishment of a domestic bank's federally-chartered principal office . . . ."[271] Because a "state cannot prohibit establishment of a federally-chartered domestic bank's principal office,"[272] the court concluded that the regulation permitting such action was proper, and consistent with the terms of the Act.[273]

3. Developments in Federal Legislation.—a. Export control.—During the survey period, the House of Representatives passed the Export Administration Amendments Act of 1983.[274] Under the House version, the bill prohibited "the President from abrogating existing contracts for foreign policy reasons, without the consent of Congress."[275] However,

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[262]715 F.2d 604 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1708 (1984).

[263]715 F.2d at 607 (in violation of 12 U.S.C. § 3101(4)(a) (1982)).

[264]*Id.* (in violation of 12 U.S.C. § 3101(5)(a) (1982).

[265]*Id.* (in violation of 12 U.S.C. §§ 3101 (1)(b)(5), (4)(a) (1982)).

[266]12 U.S.C. §§ 3101, 3108 (1982).

[267]715 F.2d at 605.

[268]*Id.* at 607-08.

[269]12 U.S.C. § 3102(a) (1982).

[270]715 F.2d at 615 (quoting S. REP. No. 1073, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1421, 1422 (1978)).

[271]715 F.2d at 617.

[272]*Id.*

[273]*Id.*

[274]H.R. 3231, 98th Cong., 2d Sess., 129 CONG. REC. 16870 (1983).

[275]H.R. EXPORT TASK FORCE, THE YEAR IN TRADE 1983 ANNUAL REPORT OF THE EXPORT TASK FORCE (1983) 1 [hereinafter cited as TASK FORCE].

the President may unilaterally abrogate existing contracts in the event of "imminent or actual aggression, terrorism, nuclear weapons testing or gross violations of human rights."[276] In addition, the House Bill allowed a "licensing exemption for certain exports to countries which cooperate with the United States in applying economic sanctions for national security reasons."[277] Finally, miscellaneous provisions of the House bill would:

[a] prohibit the President from applying foreign policy export controls extraterritorially, in the absence of specific congressional approval;
[b] establish procedures to insure that products which are available without restriction to potential adversaries from foreign sources are not unilaterally controlled by the United States;
[c] prohibit restrictions on the export of food for foreign policy purposes;
[d] limit funding for the Custom Service's "Operation Exodus" to $14 million and expand the Commerce Department's resources and authorities for enforcing export controls;
[e] extend statutory restrictions on the export of Alaskan oil to 1987;
[f] extend Presidential authority to control exports under the Export Administration Act for 2 years.[278]

The Senate passed its version of the bill in early 1984.[279] The Senate's version of the bill included items that would:

[a] cede all authority for enforcement of export controls to the Customs Service;
[b] prevent the President from applying export controls to existing contracts without congressional consent;
[c] provide for Defense Department review of certain "West-West" licenses that present a danger of diversion of militarily significant items to adversary nations.[280]

Although the House of Representatives passed the Senate's bill, it was referred to conference because the House insisted on particular amendments, and has not yet been acted upon.[281] On March 30, 1984, the Export Administration Act of 1979 expired. On the same day,

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[276]*Id.*

[277]*Id.* at 2.

[278]*Id.*

[279]S. 979, 98th Cong., 2d Sess., 130 CONG. REC. S2062 (1984).

[280]TASK FORCE, *supra* note 275, at 3. *See also* CONGRESSIONAL RESEARCH SERVICE, ISSUE BRIEF NO. IB75003, *Export Controls* 1, 6 (1984); CONGRESSIONAL RESEARCH SERVICE, *Major Legislation of the Congress 98th Congress* MLC-039 (1983).

[281]*See* 130 CONG. REC. 1404 (1984).

President Reagan extended the provisions of the Act, and all regulations and existing licenses issued under the Act, until such time as the Congress reenacts the law.[282]

b. International monetary fund.—During the survey period, Congress passed a statute[283] increasing "the [United States] participation in the International Monetary Fund (IMF) by $8.4 billion."[284] In addition, restrictions strictly regulating the international lending activities of commercial banks were enacted.[285]

Under these new banking restrictions, "[B]anks are prohibited from charging rescheduling fees to [lesser developed countries] that exceed actual costs associated with such reschedulings, unless these fees are amortized over the life of the loan agreement."[286] In addition, "The Federal Reserve is required to establish so-called 'capital adequacy' standards to insure that a bank's capital resources are not improperly placed at risk by excessive foreign exposure."[287] The Federal Reserve is also directed "to establish regulations governing the creation of special 'loan-loss' reserves for problem foreign loans."[288]

c. Caribbean basin initiative.—Unquestionably, the most interesting congressional enactment during 1983 was the Caribbean Basin Economic Recovery Act.[289] This Act, which was passed over heated opposition from labor groups and small business interests, expands the region's export opportunities in the United States, thereby encouraging investment and economic growth. For example, it permits the President to eliminate tariffs for nonCommunist Caribbean and Central American countries for the next twelve years.[290] The Act requires that products undergo "substantial transformation" during production in the targeted countries, thus products that are only packaged, assembled, or diluted are not eligible. Other ineligible items include textiles, some leather goods, tuna, and petroleum products.[291] The Act also requires that countries embraced by the Act cooperate with the United States in efforts to control drug

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[282]Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (1984).

[283]Act of Nov. 30, 1983, Pub. L. No. 98-181, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 1153, 1267.

[284]TASK FORCE, *supra* note 275, at 4.

[285]*Id.*

[286]*Id.* at 5. *See also* CONGRESSIONAL RESEARCH SERVICE, ISSUE BRIEF No. IB82073, *Guidelines on Export Credit and the Export-Import Bank* (1984).

[287]TASK FORCE, *supra* note 275, at 5.

[288]*Id.*

[289]Act of Aug. 5, 1983, Pub. L. No. 98-67, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 369, 384.

[290]*Id.* §§ 211 to -12, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) at 384-85.

[291]*Id.* § 213(b), 1983 U.S. CODE CONG. & AD NEWS (97 Stat.) at 388. *See also* TASK FORCE, *supra* note 275, at 22-23.

trafficking, in sharing bank information for criminal tax purposes, and in complying with United States' copyright laws.[292]

The Act is something of an experiment, providing opportunities to a depressed area of the world with cultural and economic values in common with the United States. Some have compared it to the Marshall Plan, but it should be remembered that the Marshall Plan embraced an area of the world with substantial educational and cultural attributes not found to the same degree in the Caribbean. A success here could well portend similar efforts in other parts of the world to raise standards of living and contribute to the increased importation of American products.

The Deficit Reduction Act of 1984[293] was enacted on July 18, 1984. This Act abolished the tax deferral system for Domestic International Sales Corporations (DISC's),[294] and exempted income from qualifying Foreign Sales Corporations (FSC's).[295]

To be eligible to elect FSC status, a corporation must be organized under the laws of a foreign country, have no more than twenty-five shareholders, and have no outstanding preferred stock.[296] In addition, an FSC must maintain a foreign office with a resident director, maintain a set of the permanent books at that office, and maintain certain records at a location within the United States.[297] A qualified FSC would be able to exempt either 32% or 16/23 of its income, depending upon the type of transaction.[298] Furthermore, if an FSC met the requirements of a "Small FSC," its first $5 million would not even be taken into account in calculating its exempt income.[299]

Surely, the most vehemently contested legislation of the 98th Congress was the domestic content bill, titled the Fair Practices in Automotive Products Act, which passed the House of Representatives on November 3, 1983.[300] This bill "would require [foreign] auto manufacturers with U.S. sales of over 100,000 units to produce a significant portion of their cars in the United States."[301] For model year 1985, automakers

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[292]*Id.* § 212(b)(5) & (6), 1983 U.S. CODE CONG. & AD. NEWS at 336.

[293]Act of July 18, 1984, Pub. L. No. 98-369, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 494.

[294]Act of July 18, 1984, Pub. L. No. 98-369, § 802(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) at 997 (amending 26 U.S.C. § 995 (1982)).

[295]Act of July 18, 1984, Pub. L. No. 98-369, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 494, 985-1003.

[296]*Id.* at 986.

[297]*Id.*

[298]*Id.* at 986-87.

[299]*Id.* at 988.

[300]H.R. 1234, 98th Cong., 1st Sess., 129 CONG. REC. 9120 (1983). The bill was introduced in the Senate but no action was ever taken.

[301]TASK FORCE, *supra* note 275, at *11*.

with sales of 100,000 to 900,000 units must commit to a domestic content of 3.37 to 30%, and by 1987, to 10% and 90% for the same number of units. In the case of sales over 900,000 units, the requirements would be 30% for 1985 and 90% for 1987. The bill authorizes the Transportation Department to administer the legislation.[302]

Its proponents argue that it is the only reliable method to offset the discriminatory trade practices of foreign automakers. They claim that unless such drastic steps are taken, the automobile industry will continue to wither and perhaps die. Its opponents believe that domestic content legislation will cause a return to the disastrous high tariff days before the onslaught of the Depression. In addition, they believe that domestic content legislation will fail its appointed purpose and will unleash a backlash in other countries with paralyzing effects on American export industries. The healthy rebound of the automobile industry may reduce some of the impetus for passage of the bill, but the rescission of quotas on Japanese imports, should it occur, could reignite the pressure for its passage.

d. Trade reorganization.—On April 25, 1983, the Reagan Administration announced plans to reorganize the executive branch's trade functions. As a result, changes were made in the original Roth bill which, at that time, had passed the Senate Governmental Affairs Committee.[303] Not only has the House held hearings on the issue of trade reorganization, it has also witnessed the introduction of a reorganization bill that includes a framework for an industrial policy mechanism designed to satisfy House Democrats.[304]

The most publicized trade reorganization bill was that introduced by Senator William Roth in January of 1983.[305] His bill would have abolished the Department of Commerce and created a new Department of International Trade and Industry. The new department would assume most of the Department of Commerce's international functions, and would exercise the duties of the Office of the United States Trade Representative. Noninternational offices would have been shifted to other departments.[306]

e. Reciprocity.—The Senate passed the Reciprocal Trade and Investment Act on April 21, 1983.[307] It would expand the President's authority under section 301 of the Trade Act of 1974,[308] to permit him

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[302]*Id.*

[303]*Id.* at 20-22.

[304]*Id.*

[305]S. 121, 98th Cong., 1st Sess. (1983).

[306]TASK FORCE, *supra* note 275, at 11. *See also*, S. REP. No. 374, 98th Cong., 1st Sess. (1983).

[307]S. 144, 98th Cong., 1st Sess., 129 CONG. REC. § 5106-11 (1983).

[308]19 U.S.C. §§ 2101 to 2487 (1982).

to take retaliatory steps against countries which fail to give American exporters or investors the same opportunities as their own firms.

f. Foreign corrupt practices act reform.—The Foreign Corrupt Practices Act (FCPA)[309] is an issue which draws constant attention. Virtually every session of Congress since the enactment of the FCPA has featured an attempt to amend or abolish the Act.[310] The 98th Congress was no exception. The proposed 1983 amendments would have effected the following changes:

a. The "reason to know" test for indirect bribery through third parties would be replaced by a standard which requires an American firm to "direct or authorize, expressly or by a course of conduct," a third party to pay a bribe to a foreign official;
b. Criminal liability for accounting violations would be repealed;
c. "Facilitating" payments would be described in greater detail to explicitly include: gifts that constitute a "token of esteem";
"ordinary" expenditures associated with the sale of a good or service; and payments to "expedite or secure the performance of a routine governmental action."[311]

Of particular note to Indiana, the White House announced new import restrictions on imported specialty steel which placed additional tariffs of eight percent on steel plate and ten percent on strips and sheets. It also imposed quotas on imports of bar, road, and tool steel. These restrictions will be in effect for several years, but the tariffs are to be gradually reduced and quota ceilings are to be gradually raised over the four year period.[312] The European Economic Community demanded that because of these restrictions, the United States must grant concessions in some other product category under the General Agreement on Tariffs and Trade. If the United States did not do so, the EEC threatened to restrict exports of chemicals and sporting goods to Europe.[313]

The United States and the Soviet Union signed a new grain agreement on August 25, 1983.[314] The Soviet Union agreed to buy between nine million and twelve million tons of wheat and corn each year for the next five years. The United States may not interrupt the flow of grain during the life of the agreement. There is no "short-supply" provision,

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[309]15 U.S.C. §§ 78dd-1 to 78dd-2 (1982).
[310]TASK FORCE, *supra* note 275, at 25.
[311]*Id.* at 27.
[312]*Id.* at 7-8.
[313]*Id.*
[314]*Id.* at 13.

but the Soviets must notify Washington if they want to purchase more than twelve million tons in a year.[315] The Soviets may reduce the amount of corn and wheat by the amount of soy bean and soy bean meal they purchase, but they cannot purchase less than four million tons of either wheat or corn in any given year. Finally, private grain dealers which supply the bulk of the commodities to Soviet trading companies must report any sales in excess of one hundred thousand tons within twenty-four hours of the sale.[316]

C. Conclusion

Although the United States did experience some recent difficulties in international trade, significant events of importance to Indiana's commerce did occur. The loan guarantee program, specialty steel quotas, and the Soviet grain agreement are notable examples. Portents of change also occurred, namely congressional passage of the domestic exemption. Pressures for change are mounting, and it is safe to conclude that international trade issues will soon move to the legislative forefront.

Indiana is in need of a comprehensive strategy to take maximum advantage of its favorable environment. In short, Indiana must further internationalize its economy by providing additional educational and international economic services to companies interested in exporting, and by attracting more overseas investments. The Indiana attorneys have a significant role in this process. In increasing their base of international expertise, attorneys will provide invaluable assistance and enjoy significant economic growth opportunities. Hoosier attorneys can also provide the leadership to assist our state in realizing its international potential.

Indiana is now linked to the world economy. The question is whether international factors will manage us or we will manage them. If we plan accordingly, the answer is not in doubt.

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[315] *Id.*

[316] *Id.*