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Florida and International Legal Developments 1962-1963

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FLORIDA AND INTERNATIONAL LEGAL DEVELOPMENTS 1962-1963

S. A. BAYTCH*

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This second *Survey* follows the outlines adopted for the first and serves the same purpose, which is to give a summary view of international legal developments of interest to Florida, affecting not only areas immediately adjacent to seas around Florida, particularly the Caribbean, but also the whole Western Hemisphere. Developments of world-wide significance will also be considered.

I. GENERAL PROBLEMS

Recently, the role of law in international relations has been felt more keenly than ever before. The idea that the world may continue to exist only if order can be based on the rule of law has gained momentum.¹ There is hardly an international event of consequence in which legal implications are not a codetermining factor.² This phenomenon also gives rise to difficulties in ascertaining workable rules of international law in a rapidly changing world where the adjustment of the traditional international law (satisfactory in the pre-atomic missile age) to modern technical advances in communications, space exploits, and techniques in making war, is imperative.

The paramount goals of the foreign policy of the United States include the safeguarding of the security of the nation and its free institu-

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1. Friedmann, *National Sovereignty, International Cooperation, and the Reality of International Law*, 10 U.C.L.A.L. REV. 739 (1963); Wright, *Toward a Universal Law for Mankind*, 63 COLUM. L. REV. 435 (1963).

2. Morse, *Law and American Foreign Policy*, 7 A.B.A. INT'L & COMP. L. BULL. 11 (1963); Schwebel & Gardner, *The Case for International Law*, 48 DEP'T STATE BULL. 785 (1963).

tions, the keeping of peace, and the participation in the accelerated political, social and economic progress of the world. As expressed recently by Congress, these aims may best be achieved in a "worldwide atmosphere of freedom."³ Therefore, forces of freedom shall be strengthened by aiding friendly nations in the development of their resources and improvement of their standard of living, by assisting them to realize their "aspiration for justice, education, dignity, and respect as individual human beings," and by "establishing responsible governments." Since economic growth is closely tied in with political democracy, free economic institutions, productive capacities and increased cooperation and trade among countries, freedom of the press, information, and religion, freedom of navigation in international waterways, and recognition of all private persons to travel and to pursue their lawful activities without discrimination as to race or religion, should be encouraged. In striving toward these objectives, controversies that may arise in relation to friendly nations are to be resolved by "adjudication of the issues involved by means of international law procedures available to parties."⁴

Translated into action these objectives create a host of legal problems, organizational, procedural and substantive, not only on the international plane, but also within domestic law.⁵

A. *Latin America*

Within the Western Hemisphere the realization of these goals requires not only actions of the traditional diplomatic or military nature,⁶ but also in its socio-economic aspects, unprecedented methods are called for. The ever increasing pressure of the forgotten man in Latin America has forced upon local governments and indirectly, upon the United States, complicated schemes of international cooperation. The most significant instrument of hemispheric cooperation, both in diplomatic as well as cultural and socio-economic matters, remains the Organization of American States,^{6a} recognized by the United States as one of the significant regional organizations. The role of the Organization has recently been proven in the Cuban crisis though it became less impressive during its aftermath. In socio-economic matters its activities consist of policy-making rather

3. Act for International Development § 102, 75 Stat. 424 (1961). See also THOMAS & THOMAS, *THE ORGANIZATION OF AMERICAN STATES* (1963); Dreier, *The Organization of American States and the United States Policy*, 17 INT'L ORG. 36 (1963); Fitzgibbon, *The Organization of American States: Time of Ordeal*, 5 ORBIS 74 (1961).

4. Act for International Development § 102, 75 Stat. 424 (1961).

5. See generally SENATE COMM. ON FOREIGN RELATIONS, HOUSE COMM. ON FOREIGN AFFAIRS, *LEGISLATION ON FOREIGN RELATIONS WITH EXPLANATORY NOTES*, 87th Cong., 2d Sess. (1962).

6. RONNING, *LAW AND POLITICS IN INTER-AMERICAN DIPLOMACY* (1963); HOUSE COMM. ON FOREIGN AFFAIRS, *REGIONAL AND OTHER DOCUMENTS CONCERNING UNITED STATES RELATIONS WITH LATIN AMERICA*, 87th Cong., 2d Sess. (1962).

6a. FENWICK, *THE ORGANIZATION OF AMERICAN STATES: THE INTER-AMERICAN REGIONAL SYSTEM* (1963).

than direct action. In view of this and the inherent diplomatic difficulties within the organization, the United States decided to channel its main contributions to the development of Latin America through its own Alliance for Progress. As defined in the Foreign Assistance Act of 1962,⁷ the Alliance is based on the idea that aid should go to nations willing to help themselves by mobilizing their own resources and by adopting reform measures designed to "spread the benefits of economic progress among the people." Assistance was to be furnished toward the "development of human as well as economic resources, in the spirit of the Act of Bogota and the Charter of Punta del Este."⁸

On their part, two groups of Latin American republics are continuing their efforts at consolidating and gradually integrating their economies by developing common markets.⁹ Both the Latin American Free Trade Association¹⁰ and the Central American Common Market¹¹ are making

7. Act for International Development § 102, 75 Stat. 424, as amended by Foreign Assistance Act, 76 Stat. 255 (1962), supplemented by Appropriations Act, 76 Stat. 1163 (1963).

8. *Ibid.* See also DREIER, *THE ALLIANCE FOR PROGRESS: PROBLEMS AND PERSPECTIVES* (1962); GORDON, *A NEW DEAL FOR LATIN AMERICA: THE ALLIANCE FOR PROGRESS* (1963); MANGER, *THE ALLIANCE FOR PROGRESS: A CRITICAL APPRAISAL* (1963); PAN AMERICAN UNION, *THE ALLIANCE FOR PROGRESS: ITS FIRST YEAR, 1961, 1962* (1963); Chayes, *The Lawyer and the Alliance for Progress*, 47 DEP'T STATE BULL. 192 (1962); Felix, *The Alliance for Progress; The Long and the Short View*, 6 CENT. REV. ARTS & SCIENCES 323 (1962); Fitts, *The Role of the Alliance for Progress in Latin American Tax Policies*, TAX INST. OF AMERICA, TAX POLICY ON UNITED STATES INVESTMENT IN LATIN AMERICA 217 (1963); Hanson, *The First Year: Economy*, 16 INTER-AMERICAN ECONOMIC AFFAIRS 31 (1962); Hanson, *Notes on the Alliance for Progress*, 17 INTER-AMERICAN ECONOMIC AFFAIRS 85 (1963); Hickey, *The First Year: Business*, 16 INTER-AMERICAN ECONOMIC AFFAIRS 49 (1962); Hyde, *Economic Development in General and Development Agreements*, 105 RECUEIL DES COURS (Hague) 271 (1963); Laylin, *The Legal Climate for Private Enterprise Under the Alliance for Progress*, 41 N.C.L. REV. 364 (1963); Lleras Camargo, *The Alliance for Progress: Aims, Distortions, Obstacles*, 42 FOREIGN AFFAIRS 25 (1963); May, *The Alliance for Progress in Historical Perspective*, 41 FOREIGN AFFAIRS 757 (1963); Moscoso, *Social Change and the Alliance for Progress*, 16 INTER-AMERICAN ECONOMIC AFFAIRS 73 (1962).

9. URQUIDI, *FREE TRADE AND ECONOMIC INTEGRATION IN LATIN AMERICA: TOWARD A COMMON MARKET* (1962); UNITED NATIONS, *MULTILATERAL ECONOMIC CO-OPERATION IN LATIN AMERICA* (1962); Mikesell, *The Movement Toward Regional Trading Groups in Latin America*, in *LATIN AMERICAN ISSUES: ESSAYS AND COMMENTS* 125 (Hirschman ed. 1961); Perloff & Almeida, *Regional Economic Integration in the Development of Latin America*, 1 ECONOMIA LATINOAMERICA 150 (1963); Urquidi, *The Common Market as a Tool of Latin America's Economic Development*, in *LATIN AMERICAN ISSUES: ESSAYS AND COMMENTS* 151 (Hirschman ed. 1961); *Economic Integration in Latin America*, 17 RECORD OF THE N.Y. C.B.A. 5 (Supp. 1962). Collection of documents in INSTITUTO INTERAMERICANO DE ESTUDIOS JURIDICOS INTERNACIONALES, *INSTRUMENTOS RELATIVOS A LA INTEGRACIÓN ECONOMICA EN AMERICA LATINA* (Washington, 1964).

10. *The Free Trade Area*, 5 ECON. BULL. LATIN AMERICA 7 (1962); Farag, *The Latin American Free Trade Area*, 17 INTER-AMERICAN ECONOMIC AFFAIRS 73 (1963).

11. PINCUS, *THE CENTRAL AMERICAN COMMON MARKET* (1962); Gigax, *The Central American Common Market*, 16 INTER-AMERICAN ECONOMIC AFFAIRS 59 (1962); *General Situation and Future Outlook of the Central American Economic Integration Programme*, 8 ECON. BULL. LATIN AMERICA 9 (1963). Staley, *Central American Economic Integration*, 20 So. ECON. J. 88 (1962). A new Charter of the Organization of Central American States has been signed at Panama, on December 12, 1962; text in 2 INT'L LEG. MAT. 235 (1963); Engel, *New Charter of the Organization of Central American States*, 58 AM. J. INT'L L. 127 (1964).

progress in spite of difficulties inherent in their economies, primarily due to the small volume of trade within and among their countries, spotty industrialization coupled with high production costs, particularly where mixed industries have been developed (*i.e.*, private and government controlled), and the lack of mass purchasing power.

Some problems causing frictions with Latin American countries have recently been solved, one of which was the final settlement of the Chamizal boundary dispute with Mexico in July 1963.¹² However, the controversy regarding the distribution of waters remains unsolved.¹³ Talks with Panama, which insists on its sovereignty over the Canal Zone, have resulted in some measure of agreement.¹⁴ An understanding was reached with Brazil in March, 1963, on economic and financial matters, without improving the badly drifting economy of the South American giant.¹⁵

B. *The Caribbean*

There is presently no area in the world of greater significance to Florida than the Caribbean, not only because of its geographic proximity, but also because of the role it has assumed in the hemisphere. Instead of continuing toward an organic consolidation preparatory to the gradual emancipation from European powers,¹⁶ an outpost of a new colonial

12. 49 DEP'T STATE BULL. 480 (1963); Moore, *The Chamizal Zone—Rivers & Revolutions on the Border*, 17 SW. L.J. 86 (1963); Sepulveda, *El Chamizal y Algunas Cuestiones Diplomáticas Pendientes entre México y los Estados Unidos*, 12 REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO 487 (1962); Sepulveda, *Areas of Dispute in Mexican-American Relations*, 17 SW. L.J. 98 (1963). The agreement is in force, 50 DEP'T STATE BULL. 49, 186 (1964); Gregory, *The Chamizal Settlement: A View from El Paso*, 1 SW. STUDIES 1 (1963). Presently, S. 2394 is before Senate designed to facilitate compliance with the agreement.

13. Piper, *A Justiciable Controversy Concerning Water Rights*, 58 AM. J. INT'L L. 1019 (1962); Hundley, *The Colorado River Waters Dispute*, 42 FOREIGN AFFAIRS 495 (1964). In regard to migratory farm labor: *Hearings Before the House Agriculture Committee on the Mexican Farm Labor Program*, 88th Cong., 1st Sess. (1963); Agreement regarding migratory workers signed Dec. 20, 1963, extending the Agreement of August 11, 1951, 2 U.S.T. & O.I.A. 1940, as amended, T.I.A.S. No. 5492. Cf. Act to amend title 5 of the Agricultural Act of 1949, 77 Stat. 363 (1963).

14. 48 DEP'T STATE BULL. 171 (1963); 49 DEP'T STATE BULL. 246 (1963); Minger, *Panama, The Canal Zone and the Titular Sovereignty*, 14 W. POL. Q. 544 (1961). The "flag-suit" is contained in *Doyle v. Fleming*, 219 F. Supp. 277 (D.C.Z. 1963). The Panamanian position is presented in KING, *EL PROBLEMA DE LA SOBERANIA EN LAS RELACIONES ENTRE PANAMA Y LOS ESTADOS UNIDOS* (1961); Abrahams, *Nuestras Relaciones con los Estados Unidos*, 5 ANUARIO DE DERECHO 233 (1961); Benedetti, *El Problema de la Soberanía en la Zona del Canal*, 5 ANUARIO DE DERECHO 239 (1961); Reyes Testa, *Nuestra Bandera y Nuestra Soberanía en la Zona del Canal*, 5 ANUARIO DE DERECHO 249 (1961). On recent developments following the break of diplomatic relations by Panama 50 DEP'T STATE BULL. 152 (1964); resolution of the O.A.S., 50 DEP'T STATE BULL. 300 (1964); on the action before the U.N. Security Council, 11 U.N. REV. 6 (1964). Cf. BAXTER, *THE LAW OF INTERNATIONAL WATERWAYS, WITH PARTICULAR REGARD TO INTEROCEANIC CANALS* (1964). Note Agreement with Panama regarding withholding of Panamanian income tax, 1963 T.I.A.S. No. 5445.

15. *U.S. and Brazil Reach Understanding in Economic and Financial Talks*, 48 DEP'T STATE BULL. 557 (1963); investment guaranty agreement between the United States and Argentina, signed June 5, 1963, 2 INT'L LEG. MAT. 776 (1963).

16. MITCHELL, *EUROPE IN THE CARIBBEAN: THE POLICIES OF GREAT BRITAIN, FRANCE AND*

empire, the Sino-Soviet bloc has been established. Smoldering fires on the islands, particularly in the underdeveloped areas of Haiti and the Dominican Republic, as well as in the adjacent mainland, particularly in British Guiana¹⁷ and the independent republics of Colombia and Venezuela, add to the unfortunate disarray, both in terms of international as well as internal matters.¹⁸ The most disquieting area, Cuba, brought the hemisphere, if not the world, to the brink of atomic war.

C. *The Cuban Crisis*

Tension between the United States and Cuba increased after Castro's open alignment with the Sino-Soviet bloc. The United States imposed an embargo on trade with Cuba on February 7, 1962,¹⁹ which prohibited the importation into the United States of all goods of Cuban origin and of all goods imported from or through Cuba, as well as on all exports from the United States to Cuba. Moreover, no assistance was afforded to the Republic.²⁰ When the situation further deteriorated, Congress, in a Joint Resolution of October 3, 1962,²¹ invoked the Monroe Doctrine, the Rio Treaty of 1947 and the Punta del Este Declaration, and declared the United States to be determined to prevent "by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or threat of force, its aggressive or subversive activities to any part of this hemisphere"; to prevent in Cuba "the creation or use of an externally supported military capability endangering the

THE NETHERLANDS TOWARDS THEIR WEST INDIAN TERRITORIES IN THE TWENTIETH CENTURY (1963); Parks, *European Possessions in the Americas*, 4 J. INTER-AMERICAN STUDIES 395 (1962).

17. On recent developments in the British possessions, see Kelly, *The Jamaican Independence Constitution of 1962*, 3 CARIBBEAN STUDIES 3 (1963). Change of the status of Bahamas, 1963 PUBLIC LAW 118; *Report of the Bahamas Constitutional Conference* 1963 (Cmd. 2048); independence Jan., 1964. East Caribbean Federation, 1962 PUBLIC LAW 382; independence constitution for Trinidad and Tobago, 1962. In relation to Jamaica note agreement regarding trade in cotton textiles, 1963 T.I.A.S. No. 5435, and agreement on economic, technical and related assistance, 1963 T.I.A.S. No. 5457. In relation to Bahamas note agreement with the U.K. regarding undersea test and evaluation center, 1963 T.I.A.S. No. 5441. British Guiana Independence Conference, 1962, adjourned, 1963 PUBLIC LAW 119.

18. SPRINGER, REFLECTIONS ON THE FAILURE OF THE FIRST WEST INDIAN FEDERATION (1962); Archibald, *The Failure of the West Indies Federation*, 18 WORLD TODAY 233 (1962); Bourne, *The Federation of the West Indies*, 13 U. TORONTO L.J. 135 (1960); Marshall, *The Federation of the West Indies: The End of an Experiment?*, 15 CURRENT LEGAL PROBLEMS 126 (1962); Proctor, *The Functional Approach to Political Union: Lessons from the Effort to Federate the British Caribbean Territories*, 10 INT'L ORGANIZATION 35 (1956); Sherlock, *Prospects in the Caribbean*, 41 FOREIGN AFFAIRS 744 (1963); Springer, *Federation in the Caribbean: An Attempt that Failed*, 16 INT'L ORGANIZATION 758 (1962); Wallace, *The West Indies: Improbable Federation?*, 27 CANADIAN J. ECON. & POL. SCIENCE 444 (1961); THE WEST INDIES FEDERATION: FALL AND DECLINE, 17 INT'L JOURNAL (Toronto) 268 (1962).

19. 27 Fed. Reg. 1085 (1962). On Cuba generally, ALVAREZ DIAZ (a.o.), UN ESTUDIO SOBRE CUBA: COLONIA-REPUBLICA-EXPERIMENTO SOCIALISTA (U. Miami Press, 1963).

20. Foreign Assistance Act of 1962 § 620(1), 76 Stat. 255 (1962). Regarding the 1960 embargo, see P. & E. Shipping Corp. v Banco Para el Comercio Exterior de Cuba, 307 F.2d 415 (1st Cir. 1962); United States v. 34 Piper Pawnee Aircraft, 218 F. Supp. 244 (D. Fla. 1963).

21. 76 Stat. 697 (1962).

security of the United States"; and, to work with the OAS and Cubans for self-determination. Shortly thereafter, evidence became available that offensive missiles of Soviet origin had been installed on the Island. This precipitated an unprecedented crisis,²² and Florida became the center of extensive military operations.

In his history-making speech of October 22, 1962, President Kennedy outlined the position of the United States. Considering the Soviet military build-up in Cuba as a "threat to peace and security" in the sense of the Rio Pact of 1947, brought about in violation of Soviet assurances coupled with deliberate deception, the President stated that there was an "unjustified change in the status quo which cannot be accepted." It was further asserted that the military build-up was a "clear and present danger" which entitled the United States to take action, both through the Organization of American States as well as the United Nations, without, at the same time, "limiting our freedom of action." The President indicated that since "we no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril," a variety of actions was to be taken. Among those were the imposition of a quarantine, the resort to the Organization of American States and to the United Nations, and a direct appeal to the Soviet Union (since Cuba did not appear as the protagonist) to "halt and eliminate this clandestine, reckless, and provocative threat to world peace."²³

The same evening that the speech was delivered, a request was submitted by the United States for a meeting of the United Nations Security Council,²⁴ accompanied with a draft resolution, demanding, *inter alia*, the immediate dismantling and withdrawal of offensive weapons and the dispatch of United Nations observers to Cuba. The next day, October 23, the Council of the Organization of American States met as an organ of consultation, and after a statement by Secretary Rusk,²⁵ unanimously

22. For a helpful discussion, see Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335 (1962). Documents are collected in LARSON, *THE CUBAN CRISIS OF 1962: SELECTED DOCUMENTS AND CHRONOLOGY* (1962); SMITH, *WHAT HAPPENED IN CUBA: A DOCUMENTARY HISTORY* (1963). See also Crane, *The Cuban Crisis: A Strategic Analysis of American and Soviet Policy*, 6 ORBIS 528 (1963); McWhinney, *Canadian-United States Commercial Relations and International Law: The Cuban Affair as a Case Study*, in CANADA-UNITED STATES TREATY RELATIONS 135 (DEENER ed. 1963); Virally, *A Propos de l'Affaire de Cuba: "Diplomatie Tranquille" et Crises Internationales*, 8 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 457 (1963).

23. 47 DEP'T STATE BULL. 715 (1962). Cf. Paolillo, *Regionalismo y Acción Coerciva Regional en la Carta de Naciones Unidas*, ANUARIO URUGUAYO DE DERECHO INTERNACIONAL 211 (1962).

24. 47 DEP'T STATE BULL. 724 (1962); *Critical Situation in Caribbean Urgently Considered by Security Council*, 9(11) U.N. REV. 6 (1962). Gardner, *The United Nations in Crisis: Cuba and the Congo*, 48 DEP'T STATE BULL. 477 (1963); Halderman, *Regional Enforcement and the United Nations*, 52 GEO. L.J. 89 (1963).

25. 47 DEP'T STATE BULL. 720 (1962); FENWICK, *THE ORGANIZATION OF AMERICAN*

adopted a resolution calling for immediate dismantling and withdrawal of all missiles and other weapons and recommended to member-states, in accordance with articles 6 and 8 of the Rio Treaty, to take

all measures, individually and collectively, including the use of armed force, which they may deem necessary to insure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.

The resolution also required that the United Nations Security Council be informed of this resolution in accordance with article 54 of the Charter, and expressed the hope that United Nations observers would be dispatched to Cuba at the earliest moment.²⁶

The same evening, the President issued a proclamation with the stated purpose being "to defend the security of the United States."²⁷ Relying both on the Joint Resolution of October 3, 1962, as well as the resolution of the Organization of American States, the proclamation prohibited the delivery of offensive weapons and associated material to Cuba by measures to be taken by "land, sea and air forces of the United States in cooperation with any forces that may be made available by other American States." Any vessel or craft proceeding toward Cuba was subject to being intercepted and directed to identify itself, its cargo, equipment, stores and its ports of call. The vessel was required to submit to visit and search. Refusal to comply was to result in taking the vessel or craft into custody. Force was not to be used except in case of failure or refusal to comply with directions or regulations and only to the extent necessary.

After a discussion in the Security Council and the active intervention by the U.N. Secretary General, as well as an exchange of letters²⁸ between the President and Khrushchev, the quarantine was lifted. A few days later, the crisis was alleviated by a joint statement between the United States and the Soviet Union without any intervention by Cuba.²⁹

The action taken by the United States³⁰ prompted an animated dis-

STATES: THE INTER-AMERICAN REGIONAL SYSTEM 245 (1963); *Action by the O.A.S.: When is Security Council Authority Required Under Art. 53 of the U.N. Charter*, 10 U.C.L.A.L. REV. 837, 867, 869 (1963); MacDonald, *The Organization of American States in Action*, 15 U. TORONTO L.J. 359, 395 (1964).

26. 47 DEP'T STATE BULL. 722, 723 (1962).

27. Executive Order No. 3504, 27 Fed. Reg. 10401 (1962).

28. 47 DEP'T STATE BULL. 741 (1962).

29. 48 DEP'T STATE BULL. 153 (1963).

30. Recent discussions of the basic issues can be found in the following sources: BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (1958); MCDUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* (1958); *THE INTER-AMERICAN SECURITY SYSTEM AND THE CUBAN CRISIS* (Tondel ed. 1963);

discussion among writers. The majority agree that the action taken was in accordance with international law. A point particularly stressed was that standards developed in the pre-atomic age can no longer apply, and that the conflict has to be analyzed as one involving the United States and the Soviet Union, and not Cuba.³¹ A smaller though impressive group dissents.³² A third group maintains the surprising position that in situations of this kind international law simply does not apply.³³

The negotiated outcome of the missile crisis afforded the United States with only the promise of removal of missiles and bombers from Cuba; this, however, did not change the fact of a Sino-Soviet affiliated government in the Caribbean.³⁴ In view of this fact, further measures have been taken to implement the Joint Resolution of October 3, 1962. One measure which was adopted by the General Services Administration³⁵

Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. YB. INT'L L. 183 (1962); Falk, *The United States and the Doctrine of Non-intervention in the Internal Affairs of Independent States*, 5 HOW. L.J. 163 (1959); Fawcett, *Intervention in International Law, a Study of Recent Cases*, 103 RECUEIL DES COURS (Hague) 347 (1962); Giraud, *A Propos de l'Affaire Cubaine, la Quarantaine: l'Interdiction du Recours à la Force, la Theorie et la Pratique des Nations Unies*, 67 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 501 (1963); Graber, *United States Intervention in Latin America*, 16 YB. WORLD AFFAIRS 23 (1962); Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice*, 37 BRIT. YB. INT'L L. 269 (1962); Layton, *The Effect of Measures Short of War on Treaties*, 30 U. CHI. L. REV. 96 (1962); Ronning, *Intervention, International Law, and the Inter-American System*, 3 J. INTER-AMERICAN STUDIES 249 (1961); Plimpton, *Principles of International Law Concerning Friendly Relations and Cooperation Among States: Threat or Use of Force*, 49 DEP'T STATE BULL. 973 (1963); and *Principles of International Law and Cooperation Among States: International Law and Nonintervention*, 50 DEP'T STATE BULL. 133 (1964).

31. Alford, *The Cuban Quarantine of 1962: An Inquiry Into Paradox and Persuasion*, 4 VA. J. INT'L L. 35 (1964); Ball, *Lawyers and Diplomats*, 47 DEP'T STATE BULL. 987, 989 (1962); Chayes, *The Legal Case for United States Action on Cuba*, 47 DEP'T STATE BULL. 763 (1962); *Law and the Quarantine of Cuba*, 41 FOREIGN AFFAIRS 550 (1963); *Remarks*, 1963 PROC. AM. SOC. INT'L L. 10 (1963); Christol & Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba*, 57 AM. J. INT'L L. 525 (1963); Fenwick, *The Quarantine Against Cuba: Legal or Illegal*, 57 AM. J. INT'L L. 588 (1963); MacChesney, *Some Comments on the Quarantine of Cuba*, 37 AM. J. INT'L L. 592 (1963); McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963); Mallison, *supra* note 22; Meeker, *The Role of Law in the Political Aspects of World Affairs*, 27 ALBANY L. REV. 194, 200 (1963); Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515 (1963); Partan, *The Cuban Quarantine: Some Implications for Self-Defense*, 1963 DUKE L.J. 696; Raymond, *Legal Implications of the Cuban Crisis*, 3 SANTA CLARA LAW. 126 (1963); Seligman, *The Legality of United States Quarantine Action Under the United Nations Charter*, 49 A.B.A.J. 142 (1963).

32. Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963); see also 1963 PROC. AM. SOC. INT'L L. 9 (1963).

33. Acheson, *Remarks*, 1963 PROC. AM. SOC. INT'L L. 13 (1963), stated that the quarantine is "not a legal issue or an issue of international law as these terms should be understood." *Id.* at 14. The action taken was the "right action," but "wisdom for the decision was not to be found in law, but in judgment," since, in the opinion of the former Secretary of State, "principles, certainly legal principles, do not decide concrete cases." *Id.* at 15.

34. Montague, *A Brief Study of Some of the International Legal and Political Aspects of the Guantanamo Bay Problem*, 50 KY. L.J. 459 (1962); Reeves, *The Cuban Situation and the Political and Economic Relations of the United States and Cuba*, 17 BUS. LAW. 980 (1962).

35. 28 Fed. Reg. 3706 (1963).

was that no cargo financed by the current administration was to be shipped from the United States in a foreign-flag vessel if the vessel had called at a Cuban port. Furthermore, a far reaching economic blockade affecting all assets of persons in Cuba was imposed in 1963.³⁶ The blockade prohibited persons subject to the jurisdiction of the United States from engaging in unlicensed transfers of United States currency to or from Cuba. It also prohibited all other unlicensed transactions with Cuba or Cuban nationals or transactions involving property in which there is a Cuban interest. Cuban refugees in the United States and elsewhere, however, were to be regarded as unblocked nationals unless they were acting on behalf of the Cuban regime.³⁷

D. *Recognition of Governments*

Due to the instability of Latin American governments and to the acceptance there of unconstitutional changes, the question of recognition of de facto governments, *i.e.*, governments which came into power outside of constitutional processes, presents a practical diplomatic and legal question³⁸ involving national interests and sensitivities deeply imbedded in Latin America. The prevailing test used by the United States in deciding whether or not to recognize a de facto foreign government generally follows the pragmatism, so-called Jeffersonian doctrine. This approach

36. 28 Fed. Reg. 6974 (1963), as corrected, 28 Fed. Reg. 7427 (1963).

37. Additional measures have been imposed by the Foreign and Related Agencies Appropriation Act, 76 Stat. 1163 (1963), which provides that no assistance shall be available to any country which "sells, furnishes, or permits any ships under its registry to carry to Cuba, so long as it is governed by the Castro regime . . . any arms, ammunition, implements of transportation materials or strategic value, and items of primary strategic significance . . ." § 107(a). Furthermore, no economic assistance shall be furnished to any country which "sells, furnishes, or permits any ships under its registry to carry items of economic assistance to Cuba so long as it is governed by the Castro regime . . ." unless the President determines that such action would be detrimental to national interests. § 107(b).

The Foreign Assistance Act of 1963 77 Stat. 379, has prohibited any assistance to "any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation of Cuban sugar . . . or receive any other benefit under any law of the United States, until the President determines that such government has taken appropriate steps according to international law standards to return to United States citizens, and to entities . . . or to provide equitable compensation to such citizens or entities for the property taken from such citizens on or after January 1, 1959, by the Government of Cuba," § 301(e)(2), with additional provisions against any country which failed to prevent its ships or aircraft from transporting to Cuba any items of economic assistance, items of military significance, or "any other equipment, materials, or commodities, so long as Cuba is governed by the Castro regime" as well as transport such equipment, etc., from Cuba. § 301(e)(3). *Cf.* Baade, *The Legal Effect of Cuban Expropriations in the United States*, 1963 DUKE L.J. 290.

38. Fenwick, *The Problem of Recognition of De Facto Governments*, 1 INTER-AMERICAN JUR. YB. 18 (1949); *The Recognition of De Facto Governments: Is There a Basis for Inter-American Collective Action?*, 58 AM. J. INT'L L. 109 (1964); Wright, *Recognition, Intervention and Ideologies*, 7 INDIAN YB. INT'L AFFAIRS 89 (1958); Bierzanek, *La Nonreconnaissance et le Droit International Contemporain*, 8 ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL 117 (1963); RESTATEMENT, THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 97-117 (1962) [hereinafter cited as RESTATEMENT]. Comment, *Current Problems Regarding the Standing of Foreign Governments To Sue in American Courts*, 112 U. PA. L. REV. 417 (1964).

originally required the government to control the state machinery and the people's acquiescence to change. A third requirement was subsequently added which called for new government to be willing and able to comply with the international obligations of the country. Only temporarily was a version of the Tobar doctrine followed under President Wilson's policy that the new government be constitutionally established.³⁹ Finally, developed in relation to Communist China, another doctrine appeared which declared recognition to be an "instrument of national policy which is both its rights and its duty to use in the enlightened self-interest of the nation."⁴⁰

Attempts to formulate principles common to the Western Hemisphere date back to 1924.⁴¹ In view of the fact that in Latin America recognition of a new government is frequently considered as an act of intervention into internal affairs, the attempted solution was to do away with recognition by making it obligatory once the pragmatic requirements were met. A draft was prepared for the 1928 interamerican conference in Havana, but failed mainly because of opposition on the part of the United States which objected to the implied duty to recognize. In 1930, a new approach was suggested by Estrada.⁴² Speaking for Mexico, he suggested the abolishment of recognition altogether as an "insulting practice which offends the sovereignty of nations and places them in a position by which judgment of some sort may be passed upon their internal affairs by other governments,"⁴³ but which leaves them free to continue or to withdraw their diplomatic representation. This attempt changed the form rather than the substance. The question reappeared at the Bogota Conference of 1948.⁴⁴ Resolution XXXV was adopted which declared that the continuity of diplomatic relations was desirable, and that the maintenance or suspension of relations "shall not be exercised as a means of individually obtaining unjustified advantages under international law." This provision as well as the interpretation that such acts do not "imply any judgment upon the domestic policy of the government," had to remain a pious wish. Equally unsuccessful was a draft prepared by the Interamerican Juridical Committee at their 1949 Rio de Janeiro Conference which attempted the impossible, namely, to reconcile all the conflicting opinions.⁴⁵

During the recent years, the United States frequently has been

39. Stowell, *The Doctrine of Continuing Constitutional Legitimacy*, 25 AM. J. INT'L L. 302 (1931).

40. 39 DEP'T STATE BULL. 385 (1955).

41. THOMAS & THOMAS, *THE ORGANIZATION OF AMERICAN STATES* 176 (1963); Irizarry y Puente, *The Doctrine of Recognition and Intervention in Latin America*, 28 TUL. L. REV. 408 (1954); Irizarry y Puente, *The Nature and Powers of De Facto Governments in Latin America*, 30 TUL. L. REV. 313 (1956).

42. Jessup, *The Estrada Doctrine*, 25 AM. J. INT'L L. 119 (1931).

43. 25 AM. J. INT'L L. 203 (Supp. 1931).

44. 1 ANNALS OF THE O.A.S. 136 (1949).

45. Freeman, *The First Meeting of the Inter-American Council of Jurists*, 44 AM. J. INT'L L. 374 (1950).

accused of continuing diplomatic relations with undemocratic or revolutionary regimes in Latin America instead of using non-recognition as an apparently welcome method of "democratic" intervention. Trying to please everyone, the recognition policy of the United States became inconsistent and pleased nobody. President Kennedy admitted this fact when questioned about the Guatemalan coup:

No, we haven't got a consistent policy because the circumstances are sometimes inconsistent. What we are interested in now is what assurance we get as to when a democratic government or when elections will be held When we have a clear idea of that, and also what the position will be of the other . . . countries . . . we will then be able to make a judgment as to whether it is in our interest to proceed ahead.⁴⁶

This lack of consistency is borne out by facts. With distinctions between the withdrawal of recognition and the break or withholding the establishment of normal diplomatic relations blurred, a government put in power by a military coup in Argentina was recognized in March, 1962,⁴⁷ as was the January, 1959, revolutionary Castro government⁴⁸ and the April, 1963, Guatemalan coup.⁴⁹ The same happened with regard to the military junta in Ecuador during August, 1963.^{49a} However, in a similar situation in Peru during July, 1963, the Department of State suspended diplomatic relations after deploring the "military coup d'etat which has overthrown the constitutional government" as being "contrary to the common purposes inherent in the interamerican system and most recently restated in the Charter of Punta del Este which the former government of Peru and other hemisphere republics pledged themselves to support a year ago," by agreeing to "work together for the social and economic welfare . . . within the framework of developing democratic institutions."⁵⁰ One month later, finding that the junta was in effective control of the government and the country, and pledged to fulfill Peru's international obligations, and taking into account the restoration of constitutional guarantees and electoral rights as well as the promise on the part of the junta to respect and defend the outcome of elections, diplomatic relations were resumed.⁵¹ A less formal method was adopted in

46. N.Y. Times, April 4, 1963, p. 10.

47. 47 DEP'T STATE BULL. 348 (1962). See Lieuwen, *Neo-militarism in Latin America: The Kennedy Administration's Inadequate Response*, 16 INTER-AMERICAN ECON. AFFAIRS 11 (1963).

48. 40 DEP'T STATE BULL. 128 (1959), noting the new government's "intention to comply with the international obligations and agreements of Cuba."

49. Recognition was extended after it was ascertained that the "new government is in full control of the county and has pledged itself to respect Guatemala's international obligations." 48 DEP'T STATE BULL. 703 (1963).

49a. 49 DEP'T STATE BULL. 282 (1963).

50. 47 DEP'T STATE BULL. 213, 214 (1962).

51. 47 DEP'T STATE BULL. 348 (1962). See also 57 AM. J. INT'L L. 119 (1963); Needler, *UNITED STATES RECOGNITION POLICY AND THE PERUVIAN CASE*, 16 INTER-AMERICAN ECON. AFFAIRS 61 (1963). For background, see 15 HISP. AM. REP. 737 (1962).

relation to Haiti. Considering the Duvalier regime unconstitutional, the United States informally "suspended" diplomatic relations for a short time.⁵²

It may be added that in spite of suspended diplomatic relations with Cuba,⁵³ the present Cuban government is still recognized by the United States as the responsible international organ of the Republic.⁵⁴ Repeated suggestions to withdraw the recognition in favor of a Cuban government in exile have been futile. In addition to diplomatic considerations, such recognition would be unwarranted by precedents⁵⁵ since recognition of a government in exile presupposes that it was constitutionally established and only temporarily forced out of the country by force of arms. In case of Cuba, it is well known that all members of the earlier Castro government, now in this country, have resigned their positions and consequently, lack continuing constitutional authority. The alternative to recognize some kind of national committee, patterned, for example, after de Gaulle's Free France, seems improbable, particularly after the experience with Miró Cardona's Revolutionary Council.⁵⁶

E. *Space Law*

In the area of space law,⁵⁷ no significant progress can be reported.

52. N.Y. Times, May 18, 1963, p. 1. Subsequent to the military coups in the Dominican Republic and Honduras, the Secretary of State stated that the "establishment and maintenance of representative government is an essential element in the Alliance for Progress," and that "under existing conditions . . . there is no opportunity for effective collaboration under the Alliance for Progress or for normalization of diplomatic relations," 49 DEP'T STATE BULL. 624 (1963). On December 14, 1963, both military governments have been recognized after giving their pledges to hold elections before the end of 1965, 49 DEP'T STATE BULL. 997 (1963). For background, see 16 HISP. AM. REP. 1018, 1204 (1964); Martin, *United States Policy Regarding Military Governments in Latin America*, 49 DEP'T STATE BULL. 698 (1963).

53. 26 Fed. Reg. 921 (1961). *Cf.* P. & E. Shipping Co. v. Banco para el Comercio Exterior de Cuba, 307 F.2d 415 (5th Cir. 1962).

54. A letter by the Department of State of June 28, 1962, 57 AM. J. INT'L L. 409 (1963), states that although diplomatic relations have been severed, recognition of the Castro government as the government of Cuba has not been withdrawn, adding that this government "can sue or be sued in the United States courts on the same basis as any other Government," a statement not supported by cases. For example, see *Guarantee Trust Co. v. United States*, 304 U.S. 126 (1938); *Ex parte Muir*, 254 U.S. 522 (1921); *P. & E. Shipping Corp. v. Banco para el Comercio Exterior de Cuba*, 307 F.2d 415 (5th Cir. 1962). *Cf.* RESTATEMENT § 390; *Dade Drydock Corp. v. The M/T Caribe*, 199 F. Supp. 871 (Tex. 1961).

55. Brown, *Sovereignty in Exile*, 35 AM. J. INT'L L. 666 (1941); Oppenheimer, *Governments and Authorities in Exile*, 36 AM. J. INT'L L. 368 (1942). *Cf.* RESTATEMENT § 114; 1 WHITEMAN, DIGEST OF INTERNATIONAL LAW 921 (1963).

56. 48 DEP'T STATE BULL. 709 (1963).

57. GOLOVINE, CONFLICT IN SPACE: A PATTERN OF WAR IN A NEW DIMENSION (London, 1962); GOLSEN, OUTER SPACE AND WORLD POLITICS (1963); HALEY, SPACE LAW AND GOVERNMENT (1963); McDUGAL, LASWELL & VLASTIC, LAW AND PUBLIC ORDER IN SPACE (1963); SCHWARTZ, INTERNATIONAL ORGANIZATIONS AND SPACE COOPERATION (1962); SEARA VAZQUEZ, INTRODUCCION AL DERECHO COSMICO (Mexico, 1961); Bayitch, *International Law*, 16 U. MIAMI L. REV. 240, 247 (1961); Berger, *Legal Problem-Subjects of Cosmic Space Exploration*, 36 TEMP. L.Q. 54 (1962); Cayes, *International Organizations and Space Law*, 48 DEP'T

Following the United Nations Resolution⁵⁸ reported in the previous *Survey*, a subcommittee of the Committee on the Peaceful Use of Outer Space met in Geneva in 1962 without reaching an agreement. In view of this, the General Assembly adopted a resolution⁵⁹ on December 19, 1962, noting with regret that no recommendations have been made. The resolution invited all members to cooperate with the Committee and requested it to continue working on "basic legal principles governing the activities of States in the exploration or use of outer space," as well as on liability for accidents and return of astronauts and their vehicles. The Assembly also referred to this Committee proposals submitted by the Soviet Union, the United Arab Republic, the United Kingdom, and the United States. The proposals by the United States dealt with assistance to and return of space vehicles and personnel, questions of liability for space vehicle accidents, and principles relating to the exploration and use of outer space. A legal subcommittee met early in 1963 and reported only that a useful exchange of views took place.⁶⁰

II. TREATIES

The treaties⁶¹ of the friendship and commerce type have gained in importance under the extended program adopted by the United States to encourage the role of free enterprise in "raising levels of production and standards of living essential to economic progress and development."⁶² As a means of furthering this policy, the same act charged the Administration to "accelerate a program of negotiating treaties for commerce and trade, including tax treaties," and, conversely, to "seek, consistently with the national interest, compliance by other countries . . . with all the

STATE BULL. 835 (1963); Cooper, *Current Developments in Space Law*, 41 N.C.L. REV. 339 (1963); Crane, *Law and Strategy in Space*, 6 ORBIS 281 (1962); Crane, *Basic Principles of United States Space Policy*, 22 FED. B.J. 163 (1962); Gardner, *Outer Space: Problems of Law and Power*, 49 DEP'T STATE BULL. 367 (1963); Garner, *Extending Law Into Outer Space*, 47 DEP'T STATE BULL. 568 (1962); Gore, *United States Policy on Outer Space*, 48 DEP'T STATE BULL. 21 (1963); Jaffe, *Reliance Upon International Custom and General Principles on the Growth of Space Law*, MILITARY L. REV. 167 (April, 1963); Johnson, *The Developing Law of Space Activities*, 3 VA. J. INT'L L. 75 (1963); Mankiewicz, *The Regulation of Activities in Extra-aeronautical Space, and Some Related Problems*, 8 MCGILL L.J. 193 (1962); Simone, *Space: A Legal Vacuum*, MILITARY L. REV. 43 (April, 1962). See also a panel discussion on the status of competing claims to the use of outer space in 1963 PROC. AM. SOC'Y OF INT'L L. 173-207 (1963).

58. U.N. GEN. ASS. OFF. REC. 16th Sess. (A/1721) (1962), 9 U.N. REV. 56 (1962). Simsarian, *Outer Space Co-operation in the United Nations*, 57 AM. J. INT'L L. 854 (1963).

59. 57 AM. J. INT'L L. 43 (1963).

60. 2 INT'L LEG. MAT. 620 (1963).

61. Bayitch, *International Law*, 16 U. MIAMI L. REV. 240, 248 (1961); TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1963 (1963); see also *Treaties Signed by the United States That Are Not Yet in Force as of Feb. 6, 1963*, 2 INT'L LEG. MAT. 284 (1963); Bishop, *Reservations to Treaties*, 103 RECUEIL DES COURS (Hague) 249 (1961); Piper, *Navigation Provisions in United States Commercial Treaties*, 11 AM. J. COMP. L. 184 (1962).

62. Act for International Development, 75 Stat. 424 (1961), 22 U.S.C. § 2151-271 (Supp. III, 1962).

treaties for commerce and trade and taxes," as well as to assist United States citizens in "obtaining just compensation for losses sustained by them or payments exacted from them as a result of measures taken or imposed by any country in violation of any such treaty."⁶³

However, the number of such treaties recently signed or ratified is surprisingly small. A treaty of friendship and commerce was concluded with Belgium in 1961 and went into force in 1963.⁶⁴ Not yet in force is a similar treaty with Luxembourg which was signed in 1962 and ratified by the President.⁶⁵ The work on tax treaties with Latin America seems to be at a complete standstill.^{65a}

A limited ban on atomic testing, signed in Moscow in 1963, was quickly ratified.⁶⁶ Special treaties regarding aviation, extradition and consular privileges are mentioned under the appropriate heading of this *Survey*.⁶⁷

III. LAW OF THE SEA

The international conventions on the law of the sea adopted in Geneva in 1958⁶⁸ are only slowly gaining ratification. The United States has ratified the four conventions on November 9, 1962,⁶⁹ but declined a number of reservations⁷⁰ made by other countries.⁷¹ In the meantime, a number of valuable studies have appeared.⁷²

63. 22 U.S.C. § 601(b)(3) (Supp. III, 1962).

64. 49 DEP'T STATE BULL. 648 (1963), T.I.A.S. No. 5432.

65. *Treaties Signed by the United States That Are Not Yet in Force as of Feb. 6, 1963*, *supra* note 61.

65a. The Convention with Honduras for the Avoidance of Double Taxation, 8 U.S.T. & O.I.A. 219 (1957), was first terminated by Honduras, 50 DEP'T STATE BULL. 25 (1964), but remained in force, 50 DEP'T STATE BULL. 312 (1964).

66. 2 INT'L LEG. MAT. 883 (1963), entered into force 49 DEP'T STATE BULL. 658 (1963); T.I.A.S. No. 5433.

67. Some municipalities in South Florida have enacted ordinances discriminating against merchandise from Iron Curtain countries. While there may not be constitutional objections against such ordinances, they may be in violation of treaties guaranteeing national or most-favored-nation treatment. A California "Buy-American" statute, CAL. GOV. CODE § 4303, had to yield to art. III, ¶ (5), pt. II, of the General Agreement on Tariffs and Trade, 61 Stat., pt. 5, at A19. *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 25 Cal. 798, 808 (1962). According to newspaper reports (*Miami Herald*, Feb. 23, 1964, p. 12-G) the Miami City Commission has turned down a request for such ordinance, while it was enacted in Virginia Gardens. In Fort Lauderdale, a city ordinance prohibiting sale of merchandise from any blacklisted nation has been found by the circuit judge to be unconstitutional when used to prevent sale of beer manufactured with hops grown in Yugoslavia. *Miami Herald*, Feb. 23, 1964, p. 12-G.

68. Bayitch, *supra* note 61, at 251.

69. 47 DEP'T STATE BULL. 862 (1962). At this time, only the Convention of the High Seas is in force. 13 U.S.T. & O.I.A. 2313 (1962); T.I.A.S. No. 5200. The importance of this convention as well as the others, once in force, will be discussed in the next *Survey*.

70. 57 AM. J. INT'L L. 122 (1963).

71. The conventions were not in force as of October, 1963. In the western hemisphere these conventions have been adopted by only a small number of countries: the Convention on the Territorial Sea and the Contiguous Zone, by Haiti (1960), and Venezuela (1961); the Convention on the High Seas, by Guatemala (1961), Haiti (1960), and Venezuela (1961); the Convention on Fishing and Conservation of the Living Resources of the High

As indicated in the previous *Survey*, the Geneva conventions did not succeed in defining the breadth of the territorial waters. Though the United States still officially adheres to the three-mile rule,⁷³ pressures are building up to extend the area of the United States control over adjacent seas, at least with regard to fishing. Prompted by Canada's revived plan⁷⁴ to extend her territorial waters with regard to fishing, to twelve miles, as indicated recently at a meeting with the United States,⁷⁵ bills have been introduced in Congress to expand the area⁷⁶ of United States control or to make effective prohibitions against aliens fishing in the presently established area of territorial sea. Among these proposals, the Bartlett Bill has been approved by the Senate and sent to the House.⁷⁷

Seas, by Colombia (1963), Haiti (1960), and Venezuela (1963); and the Convention on the Continental Shelf, by Colombia (1962), Guatemala (1961), and Venezuela (1961). The Optional Protocol Concerning the Compulsory Settlement of Disputes was not ratified by the United States, and has been ratified in the western hemisphere only by Haiti in 1960.

72. McDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962); SHIGERU ODA, *INTERNATIONAL CONTROL OF SEA RESOURCES* (1963); Bishop, *The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, 62 COLUM. L. REV. 1206 (1962); Shigeru Oda, *The Extent of the Territorial Sea: Some Analysis of the Geneva Conference and Recent Developments*, 6 JAPANESE ANNUAL OF INT'L L. 7 (1962); Svarlien, *The Territorial Sea: A Quest for Uniformity*, 15 U. FLA. L. REV. 333 (1962); Tacleff, *Shrinking the High Seas by Technical Methods: From the 1930 Hague Conference to the 1958 Geneva Conference*, 39 DETROIT L.J. 660 (1962).

73. "There is no valid basis for the assertion by a coastal State of a twelve-mile exclusive fisheries zone." A letter by the Department of State, 57 AM. J. INT'L L. 404 (1963).

74. Cohen, *International Law and Canadian Practice*, in CANADIAN JURISPRUDENCE: THE CIVIL AND COMMON LAW IN CANADA 316, 337 (1958). For the present position, see 2 INT'L LEG. MAT. 664 (1963). See also Morin, *Les Eaux Territoriales du Canada au Regard du Droit International*, 1 CANADIAN YB. INT'L L. 62 (1963). A list of recently extended fishing zones, see 2 INT'L LEG. MAT. 1122 (1963).

75. May 11, 1963, reported in 48 DEP'T STATE BULL. 518 (1963).

76. Senators Gruening and Muskie proposed a bill to conserve the offshore fishery resources by establishing a fact finding board to report to the President who may by proclamation prohibit fishing by aliens up to twelve miles off shore and establish conservation zones in these waters. S. 1816, 88th Cong., 1st Sess. (1963). The Senate of Massachusetts, on September 19, 1963, adopted a Resolution Urging the Congress of the United States to Take Appropriate Action to Extend the Present Territorial Limits, 109 CONG. REC. 17370 (1963), which points out the great extent of Soviet fishing off the Massachusetts coast and the sharp decline of domestic landings. The Resolution urges to "extend the territorial limits in regard to fishing rights from the present 3-mile to one of 200 miles."

77. S. 1988, H.R. 7954, H.R. 8296, 88th Cong., 1st Sess. (1963) (protecting fishing in United States territorial waters). After extensive hearings before the Senate Merchant Marine and Fisheries Subcommittee (*Hearings Before the Subcommittee on Fishing in U.S. Territorial Waters of the Senate Committee on Commerce on S. 1988*, 88th Cong., 1st Sess. (1963)), the bill was favorably reported to the Senate on September 12, with amendments, and passed October 1, 1963. The bill makes it unlawful for any vessel, except a vessel of the United States, to "engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico or to engage in the taking of any Continental Shelf Fishery resource which appertains to the United States except as provided by an international treaty to which the United States is a party." The bill also provides for issuance of fishing licenses to aliens as well as penalties for violation. 109 CONG. REC. 17561 (daily ed., Oct. 1, 1963). Presently the matter is regulated by 75 Stat. 493 (1961), as amended, 46 U.S.C. § 251 (1961). In regard to state law, see *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md. 1957); *Organized Village v. Egan*, 174 F. Supp. 500 (Alaska, 1959); *United States v. Borja*, 191 F. Supp. 563 (Guam, 1961).

In Florida, similar interests have found legislative expression. In order to protect state resources⁷⁸ to secure them for the citizens of Florida, and to deny, within constitutional limitations, to "nationals of alien neutral or hostile powers the right to draw upon the resources of waters long considered by the immemorial usages of all civilized peoples a part of our State and Nation," in 1963 Florida enacted the Territorial Waters Act.⁷⁹ Relying on Florida's right to "exercise and exert full sovereignty and control of the territorial waters of the State of Florida,"⁸⁰ the act provides that no fishing licenses shall be issued in the following cases:

(1) to vessels "owned in whole or in part by any alien power which subscribes to the doctrine of international communism," or which "shall have signed a treaty of trade, friendship or alliance or nonaggression pact with any communist power";⁸¹

(2) to any subject or national of a power which "subscribes to the doctrine of international communism"; and

(3) generally to "any individual who subscribes to the doctrine of international communism," regardless of nationality.⁸²

With regard to other alien vessels, the Board of Conservation is instructed to "grant or withhold said licenses . . . on the basis of reciprocity and retortion unless the nation concerned is designated as a friendly ally or neutral by a formal suggestion transmitted to the Governor of Florida by the Secretary of State of the United States." In the case of a formal suggestion, the Board is instructed to grant a license "without regard to reciprocity and retortion, to vessels of such nation."⁸³

In general terms, the act provides that it is unlawful for "any unlicensed alien vessel to take by any means whatsoever, attempt to take, or having taken to possess, any natural resource of the State's territorial waters, as such waters are described by article I of the Constitution of Florida."⁸⁴ Prescribed penalties will be imposed on violators, "provided

Recently, a new bill was introduced (H.R. 10492, 88th Cong., 1st Sess., 1964) proposing to extend "complete and exclusive national sovereignty over waters within a line 12 geographic miles distant from the line of ordinary low water along that portion of the coast of the United States which is in direct contact with the open sea, and the line marking the seaward limit of inland waters."

78. Soviet trawler traffic in the territorial waters of the United States, particularly off the coast of Florida, was discussed before the House Subcommittee for Special Investigations of the Armed Services Committee, July 9, 10, 1963. *Hearings Before the Subcommittee for Special Investigations of Russian Trawler Traffic in U.S. Territorial Waters of the House Committee on Armed Services*, 88th Cong., 1st Sess. (1963).

79. FLA. STAT. § 370.21 (1963).

80. FLA. STAT. § 370.21(2) (1963).

81. *Ibid.*

82. FLA. STAT. § 370.21(3) (1963).

83. *Ibid.*

84. FLA. STAT. § 370.21(4) (1963).

that nothing therein shall authorize the repurchase of property for a nominal sum by the owner upon proof of lack of complicity in the violation or undertaking."⁸⁵ The act also adds that "no crew member or master seeking bona fide political asylum shall be fined or imprisoned thereunder."⁸⁶

With regard to the continental shelf it is to be noted that in consequence of the Supreme Court adjudication in the controversy involving claims on the part of the Gulf states,⁸⁷ a number of bills⁸⁸ have been introduced in Congress to establish the seaward boundaries of Alabama, Mississippi, and Louisiana at three marine leagues into the Gulf and to provide for the ownership and use of submerged lands, improvements, minerals and natural resources⁸⁹ there situated.⁹⁰

In view of the divergent positions taken with regard to the breadth of territorial waters, particularly on the part of the republics along the South Pacific coast, conflicts became unavoidable. In May, 1963, Ecuador seized two American vessels within the claimed 200-mile area of its

85. FLA. STAT. § 370.21(8) (1963).

86. FLA. STAT. § 370.21(9) (1963). The new act was first used against 36 Cuban fishermen arrested by federal authorities for fishing within Florida territorial waters off Dry Tortugas (Miami Herald, February 6, 1964, p. 2-A). However, the fishermen were released on the ground that there is no federal law which would warrant prosecution, 46 U.S.C. § 251, 75 Stat. 493 (1961). The Secretary of State protested to Cuba and forwarded an information to the United Nations Security Council. 50 DEP'T STATE BULL. 276, 279 (1964). The fishermen were handed over to state authorities and brought to trial. On February 18, 1964, the four captains were found guilty in a Key West court and fined \$500 each while charges against the 25 members of the crews were dismissed. Miami Herald, Feb. 20, 1964, p. 1.

On January 10, 1964, a vessel ran aground near Dry Tortugas and dumped oil fouling the beaches. To prevent harm to animal life, beaches are being covered with sand from the sea. According to newspaper reports, Miami Herald, March 15, 1964, p. 4-C, the commandant of the Coast Guard declared that the United States has no authority over the dumping of oil outside its territorial waters. Cf. 33 U.S.C. §§ 1001-1014, particularly § 1011(a) defining the prohibited zones as "all areas within fifty miles from land . . ."

87. Bayitch, *International Law*, 16 U. MIAMI L. REV. 240, 253 (1961). For legislative background see Miami Herald, Feb. 9, 1964, p. 36-D. According to newspaper reports the Department of State as well as the Florida Internal Improvement Board have declared that a plan to build a club-casino on partially submerged reefs four miles off Elliott Key was "out of their jurisdiction." Miami Herald, Aug. 27, 1963, p. 1, col. 2. The position of the Secretary of the Interior, however, was not reported.

88. H.R. 3473-3480, 88th Cong., 1st Sess. (1963), were proposed to amend the *Submerged Lands Act* by establishing the seaward boundaries of Alabama, Mississippi and Louisiana, as extending three marine leagues into the Gulf of Mexico. These proposals were referred to the House Judiciary Committee.

89. SLOVENKO, OIL AND GAS OPERATIONS: LEGAL CONSIDERATIONS IN THE TIDELANDS AND ON LAND (1963).

90. Recent cases involving territorial waters and the continental shelf include: *Guilbeau v. Falcon Seaboard Drilling Co.*, 215 F. Supp. 909 (E.D. La. 1963); *Ross v. Delta Drilling Co.*, 213 F. Supp. 270 (E.D. La. 1962); *Abbott v. United States*, 207 F. Supp. 468 (S.D.N.Y. 1962); *Williams v. Moran, Proctor, Muesler & Rutledge*, 205 F. Supp. 208 (S.D.N.Y. 1962); *In re United States Air Force Texas Tower No. 4*, 203 F. Supp. 215 (S.D.N.Y. 1962); *United States Fid. & Guar. Co. v. Reed Constr. Corp.*, 149 So.2d 578 (Fla. 3d Dist. 1963); *Collins v. Coastal Petroleum Co.*, 118 So.2d 796 (Fla. 1st Dist. 1960). On quieting title in land on the seacoast, see *Ford v. Turner*, 142 So.2d 335 (Fla. 2d Dist. 1962).

coast.⁹¹ In spite of a plea by the Secretary of State to release the vessels, Ecuador took them into port and imposed a fine of 26,272 dollars which the Department of State advised to be paid under protest.⁹² At the same time, negotiations had commenced to settle this question, however, without visible results. This incident and other similar actions caused Congress⁹³ to suggest that foreign aid going to Ecuador be reduced by the amount of the fine. A bill also was introduced authorizing the President to place embargo on certain fish and fish products "from any country which interferes with the lawful activities of any citizen of the United States in international waters more than three nautical miles off such country."⁹⁴

IV. AVIATION

As recently formulated,⁹⁵ the United States international aviation policy is to maintain the present framework of bilateral agreements, but

91. N.Y. Times, June 1, 1963, p. 6, col. 1. See also statement by Sen. Kuchel, 109 CONG. REC. 14937 (daily ed., Aug. 23, 1963), and a statement by the Secretary of State made on June 5, 1963, 2 INT'L LEG. MAT. 212 (1963). The legal basis for Ecuadorean claims is the *Ley de pesca y cacería marítima* (Aug. 30, 1961), providing in art. 13 for a twelve-mile zone as adjacent sea; however, article 4 contains a saving clause in favor of a larger area if it should be established by an international agreement, in this case, the Chile-Ecuador-Peru convention of 1956 (text in BAYTCH, INTERAMERICAN LAW OF FISHERIES 42, 1957). According to information from the U.S. Embassy in Chile (June 29, 1963, N.C.A. Fishery Information Bull. No. 143, July 19, 1963) licenses for foreign fishing vessels will be, according to a recent decree No. 332, available only through the Ministry of Agriculture, adding that in 1962 only two such licenses have been issued to American vessels. On Peru see BELAUDE GUINASSI, LA LEGISLACIÓN PESQUERA EN EL PERU (Lima, 1963).

Sen. Kuchel submitted to the Senate a list of harassments of United States vessels by Latin American countries. 109 CONG. REC. 20181-2 (daily ed. Nov. 6, 1963). On the seizure of an American vessel by Mexican authorities beyond the three but within the nine miles zone off Mexico, see 57 AM. J. INT'L L. 899 (1963). In the French-Brazilian incident (June, 1962) regarding lobsters some twenty-two miles off the Brazilian coast, Brazil took the position that lobsters are part of the continental shelf. For the French position, see 8 ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL 1021 (1963).

92. N.Y. Times, June 6, 1963, p. 6. Under article 3 of the Act to Protect the Rights of Vessels of the United States on the High Seas and in Territorial Waters of Foreign Countries, 68 Stat. 883 (1954), owners of vessels may be reimbursed for fines paid. According to a statement by Sen. Kuchel on the floor of the Senate, 109 CONG. REC. 20182 (daily ed. Nov. 6, 1963), the amount of \$131,646.80 was paid under this provision during the fiscal year 1963.

93. Sen. Kuchel expressed concern. 109 CONG. REC. 14937 (daily ed. Aug. 23, 1963). Intervention was proposed by Rep. Pelly in the House. 109 CONG. REC. 9633 (daily ed. June 5, 1963). H.R. 7602, 88th Cong., 1st Sess. (1963), to amend the *Foreign Assistance Act of 1961* and to provide for a method of reimbursement, was introduced. On Nov. 7, 1963, the Senate adopted amendment No. 248 to the Foreign Assistance Act of 1961, to amend § 620, by adding that no assistance shall be given to any country which has "extended, or hereafter extends, its jurisdiction for fishing purposes over any area of the high seas beyond that recognized by the United States, and [which] hereafter imposes any penalty or sanction against a United States fishing vessel on account of fishing activities in such area . . ." 109 CONG. REC. 20251 (daily ed. Nov. 7, 1963). However, this amendment was deleted from the final bill and it does not appear in the Foreign Assistance Act of 1963, 77 Stat. 379.

94. H.R. 6656, 88th Cong., 1st Sess. (1963).

95. Statement on International Air Transport Policy (April, 1963), prepared by an Interagency Steering Committee and approved by the President (Press release April 24, 1963). See also Johnson, *The International Aviation Policy of the United States*, 49 DEP'T STATE BULL. 508 (1963). On interamerican problems see CARVALHO, GEOPOLITICA DO TRANSPORTE AEREO (Sao Paulo dos Campos, 1963).

to decline division of markets as being totally unacceptable to basic trade policies. Because the present network of international air routes are fully developed, expansion should be approached with caution. The capacity principle should remain flexible, thus retaining for airlines both an incentive and an opportunity. Carrier pools should not be encouraged, but rates recommended by the International Air Transportation Association should be maintained as a practical solution, with the reservation that would ensure an effective government influence on rates through congressional legislation.

In terms of international law⁹⁶ these aims are realized through multilateral or bilateral treaties, or through arrangements with domestic and foreign carriers engaged in international air transportation, or their representatives, particularly the IATA. Among the multilateral treaties the Warsaw Convention is of particular interest since the continued adherence by the United States is being questioned. Because of the drastic limitations on possible recovery, as compared with domestic standards, proposals have been made to withdraw from the Convention,⁹⁷ raise the limit of recovery, or to regulate liability by supplemental federal legislation. Less controversial is the 1948 Geneva Convention, with additional ratifications coming in.⁹⁸

The litigation involving the interpretation of article 15 of the

96. BIN CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* (1962); BILLYOU, *AIR LAW* 123 (1963); MATESCO MATTE, *TRAITÉ DE DROIT AÉRIEN-AÉRONAUTIQUE: ÉVOLUTION, PROBLÈMES SPATIAUX* (Paris, 1964). On the status of aviation treaties in Latin America, see COMISIÓN NACIONAL EJECUTIVA, *PRIMERAS JORNADAS LATINOAMERICANAS DE DERECHO AERONAUTICO*, BUENOS AIRES, 1960 at 179 (1962); also Amorin Araujo, *El Estado de Ratificaciones de las Convenciones Internacionales y su Influencia en las Legislaciones Internas de Latinoamerica* 385.

97. 49 DEP'T STATE BULL. 362 (1962); Mennel & Simenone, *United States Policy and the Warsaw Convention*, 2 WASHBURN L.J. 219 (1963). See generally Calkins, *Hiking the Limits of Liability at the Hague*, 1962 PROC. OF THE SOC. INT'L L. 120; Lissitzyn, *The Warsaw Convention Today*, 1962 PROC. OF THE SOC. INT'L L. 115; Karlin, *Warsaw, Hague, The 88th Congress and Limited Damages in International Air Crashes*, 12 DE PAUL L. REV. 59 (1962); Metzger, *Limit of Liability for Aircraft Accidents in International Transportation: The Warsaw Convention and the Hague Protocol*, 23 J. AIR L. & COM. 254 (1956); Sand, *Air Carrier's Limitation of Liability and Air Passengers' Accident Compensation Under the Warsaw Convention*, 28 J. AIR L. & COM. 260 (1962); see also LUREAU, *LA RESPONSABILITÉ DU TRANSPORTEUR AERIEN: LOIS NATIONALES ET CONVENTION DE VARSOVIE* (Paris, 1961); McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205 (1963). In Latin America the Warsaw Convention has been ratified only by Argentina, Brazil, Mexico, and Venezuela; Paraguay may have ratified (Law 476, Sept. 12, 1957); *PRIMERAS JORNADAS LATINOAMERICANAS DE DERECHO AERONAUTICO*, *supra* note 96, at 196). The Hague Protocol (1955), in force since August 1, 1963, was ratified in the Western Hemisphere only by El Salvador, Mexico and Ecuador. El Salvador and Ecuador became parties to the Warsaw Convention by ratifying the Hague Protocol, art. XXIII (2).

98. International Agreement on Rights in Aircraft, June 19, 1948, T.I.A.S. No. 2847. This treaty has presently been ratified by twenty-nine countries. Those within the Western Hemisphere that have ratified include: Argentina (1958); Brazil (1953); Chile (1956); Mexico (1953) (not in force in relation to the United States); Cuba (1961); Ecuador (1958); El Salvador (1958); and Haiti (1961). See BAYTCH, *AIRCRAFT MORTGAGE IN THE AMERICAS; A STUDY IN COMPARATIVE AVIATION LAW WITH DOCUMENTS* (1960).

Chicago Convention, reported in the previous *Survey*,⁹⁹ has been decided on appeal in favor of the defendant Port Authority.¹⁰⁰ Starting from the erroneous assumption that the "private rights of the appellees (foreign carriers) include benefits from the most favored nation clauses," the court nevertheless found the way back to the equal national treatment clause in stating that "the contracting nations agreed to apply their laws and regulations to the aircraft of all contracting states without distinction of nationality."¹⁰¹ However, with regard to the crucial question of whether, under the language of the Convention, charges imposed on "aircraft engaged in scheduled international air services [shall not be higher] than those that would be paid by its national aircraft engaged in similar international air services," are entitled to the treatment agreed upon between the defendant and a group of domestic carriers, or whether they have to accept the treatment given to all other domestic carriers engaged in international flights, the court stated, without giving any reasons, that "there is nothing whatever in the treaty that would . . . require appellant to afford the same bargain to appellees." The court added that they have "at all times been afforded uniform conditions." While the trial court expressly interpreted the national treatment clause included in article 15 of the Convention as granting foreign carriers most-favorable-national treatment available locally, in the sense of the most favorable treatment granted by local schedules to domestic carriers regardless of whether the foreign carrier fits the description or enumeration used by local schedules in defining these classes, the appellate court disagreed. However, the court did not decide that the special arrangement between the Big Four and the Port Authority was not part of the local law available to foreign carriers under the equal national clause, nor did it find that the special arrangement, though part of national law, was not available to foreign carriers, because they do not fall into the class established by that agreement. Instead, the court volunteered the prediction that the Big Four will "upon expiration of the twenty year contract . . . join the class," *i.e.*, a future uniform class of domestic carriers, and, as a consequence, the "separate classification of the two groups will then cease to exist and article 15 of the treaty will become fully effective."¹⁰² In the opinion of the court, this was also the "clear import of the treaty," which in article 82 "recognizes outstanding inconsistencies." This again seems doubtful since article 82¹⁰³ deals only with

99. Bayitch, *International Law*, 16 U. MIAMI L. REV. 240, 259 (1961). See also Rijks, *Airport Charges Under Judicial Review*, 9 NED. TIJDSCH. INT'L REV. 50 (1962).

100. Board of County Comm'rs v. Peruansa, 307 F.2d 802 (5th Cir. 1962), *cert. denied*, 371 U.S. 961, *petition for rehearing denied*, 372 U.S. 932 (1963). For a case involving unjust discrimination in fees against domestic carriers, see City & County of San Francisco v. Western Airlines, 22 Cal. 226 (1962). See also Note, 18 U. MIAMI L. REV. 482 (1963).

101. Board of County Comm'rs v. Peruansa, 307 F.2d 802, 807 (5th Cir. 1962).

102. *Ibid.*

103. The historical background of article 82 of the Convention is of no help. PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE, CHICAGO, ILLINOIS, 1944 386, 400,

arrangements between countries or between countries and foreign carriers inconsistent with the Convention. However, this provision has no bearing on the present case since the arrangement between the Port Authority and the Big Four is in no way inconsistent with the Convention which imposes no provisions as to how domestic carriers should be treated with regard to charges. Thus, the only issue that remains is how the domestic schedules apply to foreign carriers under article 15 of the Convention. In concluding, the court stated that "the contracts [establishing preferential treatment for the Big Four] subsist and so long as they do, appellees cannot complain."¹⁰⁴ The court apparently overlooked the fact that foreign carriers do not complain because the Big Four enjoy the fruits of their bargain, but rather, because they themselves are excluded from sharing them contrary to their interpretation of article 15 of the Chicago Convention.

Finally, the court raised the lack of consideration as a further justification for the decision. As already stated, the treaty provision involved contains an equal-national treatment¹⁰⁵ and not a most-favored-nation clause.¹⁰⁶ This is clearly discernible from the test of the Convention as well as being apparent from the position taken by the plaintiffs who did not invoke any treaty which had been entered into by the United States with a third country which would become available under the most-favored-nation clause. Moreover, this clause incorporates, in favor of nationals invoking the most-favored-nation clause, only international treaties and not arrangements entered into between a domestic state agency and a group of domestic carriers. Even if this position were to be contested, the conditional interpretation of the clause as being dependent on consideration has been abandoned for quite some time, which deprives *Bartram v. Robertson*¹⁰⁷ of its authority.

426, 479, 1393 (1948). However, a careful analysis of article 82 shows it to be inapplicable to the present situation. The first sentence abrogates provisions of all international agreements between countries accepting the Convention. The second sentence equally applies only to international arrangements between countries bound by the Convention, and, a "non-contracting state or a national of a contracting state or a noncontracting State inconsistent with the terms of this Convention." The application of this sentence presupposes, first, an arrangement between one country bound by the Convention and a foreign country or nationals thereof, but not their own nationals and, second, that such arrangements are inconsistent with the Convention. The third sentence only implements the second by limiting the duty to use best efforts to cases where "such inconsistent obligations" have been undertaken. In both respects, namely, being domestic and not international as well as not inconsistent with the terms of the Convention, the arrangement between the Big Four and the Port Authority is clearly outside of the scope of this treaty provision.

104. *Board of County Comm'rs v. Peruansa*, 307 F.2d 802, 808 (5th Cir. 1962).

105. BAYITCH, *CONFLICT LAW IN UNITED STATES TREATIES: A SURVEY* 22 (1955).

106. *Id.* at 25. However, there is no standard known in treaty law as the most-favored national treatment. Cf. RESTATEMENT § 158.

107. 122 U.S. 116 (1887). Another provision of article 15 of the same Chicago Convention was involved in a dispute between American air carriers and the Canadian Transport Minister. According to reports, *BUSINESS WEEK* 138, February 16, 1963, Canada charged since 1960 a fee for radio and other services to carriers flying over Canada and an additional fee for merely passing through the Canadian airspace; however, this latter fee was not

In the area of international criminal law an interesting case arose in Florida.¹⁰⁸ A federal court dismissed an indictment against defendants for having forced the pilot to transport them in an aircraft from Florida to Cuba, under the Federal Kidnapping Act¹⁰⁹ and under the amended Federal Aviation Act.¹¹⁰ With regard to the charge under the latter act the district court held that the private airplane involved was not an "aircraft in flight in air commerce," apparently interpreting the statutory language as encompassing only commercial aircraft. On direct appeal the Supreme Court held that section 101(4) of the Federal Aviation Act includes "any operation or navigation of aircraft within the limits of any Federal airway." Finding that this definition agrees with the intent of Congress as expressed during its debates, the Supreme Court reversed and remanded with instructions to reinstate both counts of the indictment.¹¹¹ The question as to the *locus delicti* and as to the relation between an act indictable both under the Federal Kidnapping Act and the Federal Aviation Act, was, however not raised here. It was raised in a similar case¹¹² involving hijacking of a commercial airliner over New Mexico in an attempt to divert it first to Mexico and then to Cuba. Since the crime occurred before the amendment to the Federal Aviation Act regarding hijacking came into force, the case was decided under the Federal Kidnapping Act and under the federal statute regarding transportation in interstate commerce, of "an aircraft . . . knowing it to have been stolen."¹¹³

It may be added that the trial court's decision in the anti-trust action by the government against Pan-American World Airways which was engaged in extensive operations in Latin America, was reversed and remanded with instructions. The Supreme Court held that the decision on

assessed if the aircraft landed in Canada and paid landing fees. In view of article 15 of the Chicago Convention that "[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon," some carriers paid under protest, while others simply refused to pay. An action was commenced in a Canadian court against an American and a Dutch carrier, but was later dropped. AVIATION DAILY, August 26, 1963.

108. *United States v. Healy*, 8 Av. Cas. 17,521 (S.D. Fla. 1962). For international developments see *Draft Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Rome, 1962*, 29 J. AIR L. & COMM. 65 (1963); *Report of the Legal Subcommittee*, 28 J. AIR L. & COMM. 285 (1963); the text of the subsequent Tokyo draft (1963) in 2 INT'L LEG. MAT. 1042 (1963). Fitzgerald, *The Development of International Rules Concerning Offenses and Certain Other Acts on Board Aircraft*, 1 CANADIAN YB. INT'L L. 230 (1963); Wilberforce, *Crime in Aircraft*, 63 J. ROY. AERONAUTICAL SOC'Y 175 (1963). See also comparative discussion by SILVEIRA DA MOTA, *AERONAUTICA E LEI PENAL NA AMERICA LATINA* (unpub. masters thesis, U. of Miami School of Law, 1962).

109. 18 U.S.C. § 1201 (1958).

110. 49 U.S.C. § 902 (1958).

111. *United States v. Healy*, 84 Sup. Ct. 553 (1964).

112. *Bearden v. United States*, 304 F.2d 532 (5th Cir. 1962), *vacated and remanded on other grounds*, 372 U.S. 252 (1962), *modified*, 307 F.2d 507 (5th Cir. 1962). See Bayitch, *International Law*, 16 U. MIAMI L. REV. 240, 260 (1961).

113. 18 U.S.C. § 2312 (1958).

charges of major restraints of trade by division of territories and allocation of routes between air carriers was within the jurisdiction of the Civil Aviation Board.¹¹⁴

V. SOVEREIGN IMMUNITY

The problem of sovereign immunity in international law involves the amenability of foreign governments as organs of foreign nations, as well as their assets, to local judicial proceedings. As already indicated in the previous *Survey*, the original doctrine of absolute immunity has given way to a limited, functional immunity.¹¹⁵

The first question, whether or not a foreign sovereign or any of its agencies may be brought into a court sitting in another country, presently depends upon the character of the cause of action. Even if nongovernmental acts (*jure gestionis*) make foreign governments amenable to local jurisdiction,¹¹⁶ jurisdiction still must be properly established. One of these methods, attachment for jurisdictional purposes (quasi-in-rem), was discussed in *Berlanti Constr. Co. v. Republic of Cuba*.¹¹⁷ The court affirmed that quasi-in-rem jurisdiction over a foreign sovereign was "incidental to and dependent upon the court's control over the res or property involved at the commencement of the action." Therefore, a subsequent "accidental, fraudulent or improper removal of the res from its control may render its judgment hollow, and as a practical matter unenforceable, but will not destroy jurisdiction or the validity of the judgment."¹¹⁸

The second question is that of enforcement of judgments obtained against a foreign sovereign. In the *Berlanti* case the question was before

113. 18 U.S.C. § 2312 (1958).

114. *United States v. Pan-American World Airways*, 371 U.S. 296 (1963), *reversing*, 193 F. Supp. 18 (S.D.N.Y. 1961), holding jurisdiction to be by statute vested in the Civil Aeronautics Board. Note, 63 COLUM. L. REV. 923 (1962); 38 N.Y.U.L. REV. 593 (1963).

115. Baylitch, *International Law*, 16 U. MIAMI L. REV. 240, 266 (1961). See Borsody, *The American Law of Sovereign Immunity Since the Tate Letter*, 4 VA. J. INT'L L. 75 (1964); Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper*, 48 CORNELL L.Q. 461 (1963); Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 SO. L. REV. 161 (1963); Niehuss, *Sovereign Immunity: The First Decade of the Tate Letter*, 60 MICH. L. REV. 1142 (1962); Note, 1962 DUKE L.J. 582. See also RESTATEMENT §§ 68-75; Comment, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1067 (1962).

116. *Harris & Co. Advertising, Inc. v. Republic of Cuba*, 127 So.2d 687 (Fla. 1961), cited in *Flota Maritima Browning de Cuba, S.A. v. S.S. Canadian Conqueror*, 30 D.L.R.2d 172 (1961).

117. 145 So.2d 256 (Fla. 3d Dist. 1962).

118. *Id.* at 258. *Flota Maritima Browning v. Motor Vessel Ciudad*, 218 F. Supp. 938 (D. Md. 1963) (delay in pleading immunity held waiver); *Republic of Iraq v. First Nat'l City Trust Co.*, 207 F. Supp. 588 (S.D.N.Y. 1962) (by appearing as plaintiff in a federal court the foreign sovereign did not permit transfer of action to a state court); *Republic of Cuba v. Arcade Building of Savannah, Inc.*, 123 S.E.2d 453 (Ga. App. 1961) (formal plea of immunity necessary regardless of the fact that funds attached in a quasi-in-rem action were government funds); *Mirabella v. Banco Industrial de la Republica Argentina*, 237 N.Y.S.2d 499 (1963) (bank created by special decree of the Republic of Argentina is not immune as a governmental instrumentality).

the court only in a particular sense. Holding that a subsequent removal of assets attached for jurisdictional purposes does not destroy jurisdiction once so established, the "permanent staying of execution" on the judgment was held erroneous. The court added that the plaintiff may "still have execution on its judgment by levying on the property originally under attachment should it in the future come within the territorial jurisdiction of the court."¹¹⁹ In *United States v. Harris & Co. Advertising, Inc.*,¹²⁰ the defendant pleaded sovereign immunity with regard to assets attached after the assets, three airplanes had already been sold. The petition by the United States on behalf of the Republic of Cuba, interposing the plea of sovereign immunity, was denied on the ground that the plea was not timely.¹²¹ Interpreting the rationale of sovereign immunity regarding assets of a foreign sovereign to be the prevention of "private individuals from interfering with the goods, possessions or chattels of a foreign nation in the judicial tribunals of the private citizen's country," held the plea untimely, "the chattels or possessions of the . . . Republic of Cuba . . . having gone beyond the control of the courts at the conclusion of the execution sales." In conclusion, the court also held that the plea of immunity

cannot reach the proceeds of the execution sales because the proceeds of said sales are not the property of the Republic of Cuba . . . but upon the sales [they] become the proceeds of the judgment creditor. . . . The attempted pleas coming after the expiration of the power of the trial judge to interfere with the chattel of a foreign nation, the reason of the doctrine of sovereign immunity no longer existed, and, therefore, there was no reason to apply the doctrine.¹²²

However, whenever in enforcement proceedings the plea of sovereign immunity was timely made, courts have complied with the request with regard to vessels,¹²³ aircraft,¹²⁴ and real property.¹²⁵ The position adopted has been that taken by the Department of State in that the property of the government of a sovereign state is immune from execution under international law.¹²⁶

119. *Berlanti Constr. Co. v. Republic of Cuba*, 145 So.2d 256 (Fla. 3d Dist. 1962).

120. 149 So.2d 384 (Fla. 3d Dist. 1963).

121. *Id.* at 385. See also *State ex rel. Nat'l Institute of Agrarian Reform v. Dekle*, 137 So.2d 581 (Fla. 3d Dist. 1962).

122. *United States v. Harris & Co. Advertising, Inc.*, 149 So.2d 384, 385-86 (Fla. 3d Dist. 1963).

123. 56 AM. J. INT'L L. 528 (1962).

124. *Ibid.*

125. *Id.* at 531.

126. *Mattei v. V/O Prodimorg*, 321 F.2d 180 (5th Cir. 1963) (Cuban sugar unloaded from a British steamship under charter to Prodimorg, an agency of the Soviet government, in Puerto Rico and there attached by Florida creditors).

VI. ACTS OF STATE

It is apparent that the act of state doctrine¹²⁷ as a general rule is being eroded by an increasing number of exceptions and refinements, some of them reaching to the very core of its traditional scope. This is due, first of all, to the realization that "this doctrine is a conflict of laws rule applied by American courts; it is not a rule of international law."¹²⁸ Consequently, the applicability *vel non* of a foreign governmental act, both legislative and administrative (judicial acts being eliminated because they ordinarily involve resolutions of private disputes and do not primarily reflect high state policy), will be decided according to the conflict law of the forum, subject to the still accepted privilege of the Executive to intervene in judicial proceedings by suggesting the extent to which courts may question acts of foreign governments. However, in international conflicts situations general rules of international law unavoidably enter the picture, mainly in two respects: by allowing the testing of the foreign governmental act against substantive rules of international law, as it happened in the *Sabbatino* case;¹²⁹ or, by checking such governmental acts against standards adopted by international law with regard to allocation of legislative powers between sovereign nations. As it will be shown, the latter test is in many instances performed simply by relying on domestic conflict rules, apparently under the assumption that a foreign country will have international jurisdiction to legislate in the matter whenever conflict rules of the forum declare the law of such foreign country controlling. This, of course, is but an emergency solution since contacts used by the *lex fori* to identify the controlling foreign legal system are not necessarily the same as those adopted by international law in determining international legislative jurisdiction. Finally, it must be added that the applicable rules of foreign law have to pass the checkpoint of the forum's public policy, which may, in various degrees, prevent a rule of foreign law from being enforced in the forum, depending in many instances on whether affirmative enforcement of a foreign rule is sought or a mere defense is intended.

The act of state doctrine was involved in a number of federal cases arising in Florida, involving insurance contracts between Cuban nationals and domestic as well as foreign insurance companies. In *Menendez v.*

127. See Bayitch, *supra* note 115, at 271; Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. PITT. L. REV. 881 (1962); Comment, *The Act of State Doctrine*, 62 COLUM. L. REV. 1278 (1962); Comment, *International Law and the Act of State Doctrine*, 9 U.C.L.A.L. REV. 406 (1962); RESTATEMENT §§ 41-46.

128. *Menendez Rodriguez v. Pan-American Life Ins. Co.*, 311 F.2d 429, 434 (5th Cir. 1962).

129. *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961), 307 F.2d 845 (2d Cir. 1962), *rev'd*, 32 U.S.L. WEEK 4220 (1964) (brief for the United States as amicus curiae, 2 INT'L LEG. MAT. 1009 (1963); Dawson & Weston, *Banco Nacional de Cuba v. Sabbatino: New Wine in Old Bottles*, 31 U. CHI. L. REV. 63 (1963); Lillich, *A Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino*, 8 VILL. L. REV. 155 (1963).

Pan-American Life Ins. Co.,¹³⁰ the court, relying on the *Sabbatino* case, held Cuban decrees to be "confiscatory and without standing in our courts,"¹³¹ which, of course, represents a most unfortunate reading of the *Sabbatino* opinion. Nevertheless, the court insisted that the "point of convergence in these cases is clear: our courts are not compelled by the act of state doctrine to give force and effect to the decrees of the Castro government in Cuba," overlooking that in the *Sabbatino* case a particular Cuban decree was held inoperative as violating a particular rule of international law and that the affected parties were American nationals. Since it is well settled that rules of international law do not apply as between a sovereign and its own national, Cuban nationals are not protected by international law in relation to their own government, except in an indirect way. This approach would be by an inquiry into the international legislative jurisdiction of the government, or, putting it in conventional terms, into the question of extraterritorial effectiveness of the acts regarding their own nationals outside of the national territory.

In insurance cases, therefore, the crucial issue from the point of view of international law remains whether or not insurance contracts between a domestic or foreign, non-Cuban insurance company and a Cuban refugee are within the reach of legislative powers of the Cuban government. In view of different contacts with the various countries involved and because of the different approaches taken by the courts, different results have been reached. The act of state doctrine pleaded as a defense against a demand for a declaratory judgment regarding the right to receive the cash surrender value on an insurance policy issued by a domestic insurance company was rejected in *Pan-American Life Ins. Co. v. Recio*,¹³² and its companion case, *Pan-American Life Ins. Co. v. Lorado*,¹³³ on a set of facts identical with those in the *Menendez* case. Florida courts avoided the act of state doctrine by resorting to conflict rules, *i.e.*, the *lex loci solutionis*, in this case American law. Holding that the insurance contract entered into by a domestic corporation, payable in dollars in the United States, "cannot be governed by Cuban laws as to the method of performance,"¹³⁴ the court indicated that at least the performance of the contract was beyond the reach of Cuban legislative powers. In such a situation, the court continued, the act of state doctrine does not apply since the defendant domestic company did business not

130. 311 F.2d 429 (5th Cir. 1962).

131. *Id.* at 436.

132. 54 So.2d 197 (Fla. 3d Dist. 1963).

133. In *Raij v. Pan-American Life Ins. Co.*, 19 Fla. Supp. 162 (Cir. Ct. 1962), the court held that the defendant's justification for nonperformance of the insurance contract, the seizure of its business in Cuba, "as unfortunate and abhorrent as it may be, is perhaps an incidental risk of defendant doing business in a revolutionary climate." *Id.* at 165. The decision was affirmed on the authority of *Pan-American Life Ins. Co. v. Recio*, 154 So.2d 197 (Fla. 3d Dist. 1963), in *Pan-American Life Ins. Co. v. Raij*, 156 So.2d 785 (Fla. 3d Dist. 1963).

134. *Pan-American Life Ins. Co. v. Recio*, 154 So.2d 197, 198 (Fla. 3d Dist. 1963).

only in the Republic of Cuba but also in the United States, and the "only contact with the law of Cuba was the fact that [the policy] was sold to a Cuban citizen." Therefore, the court declined to enforce the expropriation decrees enacted by the present government of Cuba, pleaded by the defendant as an affirmative defense to excuse its nonperformance of the contract. Similarly, the court declined the defendant's suggestion that the company lost its Cuban assets, on the ground that "the total assets of the appellant are pledged to the payment of the contract, and the contract is payable in the United States."¹³⁵

The difference between the choice of law and the international legislative jurisdiction approaches was stressed in the recent opinion of *Blanco v. Pan-American Life Ins. Co.*¹³⁶ Starting from the "futility of an appraisal of these matters by the choice of law rules," as exemplified in the *Recio* case¹³⁷ and another Louisiana decision,¹³⁸ the court found that "neither the persons nor the subject matter of this action is subject to the sovereignty of the present State of Cuba," because the assets of the insurance companies within Cuba "bore no relationship to the transitory causes of actions involved here, and obviously the domestic insurance companies are not subject to the sovereignty of the present State of Cuba."¹³⁹ With regard to the fact that the plaintiffs were Cuban nationals by origin and as such, subject "in personam to the sovereignty of the State of Cuba, and bound by the municipal law of Castro's Cuba," the court held that the plaintiffs, being refugees, were "at present political citizens of nowhere" and "civil citizens of Florida based on their domicile here, and . . . possessed of our municipal rights and obligated for municipal duties,"¹⁴⁰ and as such, entitled to protection given generally to insureds as against insurance companies, the remedy to be ascertained under local law.

In another action on an insurance policy issued by a foreign insurance company,¹⁴¹ the plaintiff demanded the payment of the cash surrender value in dollars instead of Cuban pesos as offered by the defendant. Here, the court held that Cuba, as a sovereign country, had the power to legislate on national currency and to determine that such currency (pesos) shall be the legal tender for the payment of obligations, including those originally providing for payment in dollars. The court held that the insurance contract between a Cuban national and a Canadian company was "indigenous to Cuba," apparently meaning within

135. *Id.* at 199.

136. 221 F. Supp. 219 (S.D. Fla. 1963).

137. *Pan-American Life Ins. Co. v. Recio*, *supra* note 132.

138. *Theye y Ajuria v. Pan-American Life Ins. Co.*, 154 So.2d 450 (La. App. 1963), 4 VA. J. INT'L L. 117 (1964).

139. *Pan-American Life Ins. Co. v. Recio*, *supra* note 132, at 227.

140. *Id.* at 229.

141. *Confederation Life Ins. Co. v. Ugalde*, 151 So.2d 315 (Fla. 3d Dist. 1963) (Canadian company).

Cuba's international legislative jurisdiction and, consequently, controlled by Cuban laws enacted subsequent to the issuance of the policy. Therefore, the original provision of the policy stipulating payment in dollars was "eliminated by the sovereign, and there were substituted, contract provisions that the United States dollars would not be legal tender for the discharge of the obligations under the policy and that such obligations were payable in Cuban pesos at par."¹⁴²

Among the cases just discussed only a few considered the applicability vel non of the Articles of the International Monetary Fund,¹⁴³ particularly article VIII(2)(b): "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territory of any member." In other words, article VIII(2)(b) imposes upon all members of the Fund, the duty to check "exchange contracts" against the exchange control regulations of the country whose currency is involved to determine whether or not such "exchange contract" is in violation of control regulations. In case the "exchange contract" is in violation of such regulations, and assuming that the regulations declare such contracts unenforceable, then the unenforceable status will have to be honored by all members of the Fund. This means that an "exchange contract" may be under the conflict rule of the forum governed by the *lex loci actus*, *lex loci solutionis* or by the *lex voluntatis* (the law chosen by the parties' agreement). Nevertheless, with regard to the effect to be given to the exchange control regulations of the *lex monetae* (the law of the country whose currency is involved), the conflict rules of the forum will not apply, nor will its public policy be applicable, whenever the *lex monetae* provides that "exchange contracts" in violation of exchange control regulations are unenforceable. As a consequence, the forum will have no choice but to find such an "exchange contract" unenforceable.¹⁴⁴

142. *Id.* at 322. The Florida Supreme Court reversed the *Ugalde* decision with directions to dismiss the complaint. *Confederation Life Ass'n v. Ugalde*, Nos. 32,780, 32,803, Fla., Feb. 24, 1964. The court referred to *Theye y Ajuria v. Pan-American Life Ins. Co.*, *supra* note 138, and also invoked the International Monetary Fund Agreement. See *infra* note 151. See also Comment, 18 U. MIAMI L. REV. — (1963).

143. 60 Stat. 1401 (1945) (Bretton Woods Agreement).

144. ALEXANDROWICZ, *WORLD ECONOMIC AGENCIES: LAW AND PRACTICE* 172 (1962); BAYITCHE, *CONFLICT LAW IN UNITED STATES TREATIES* 62 (1957); GOLD, *THE FUND AGREEMENT IN THE COURTS* (1962); MANN, *LEGAL ASPECTS OF MONEY* 378 (2d ed. 1953); Gold & Lachman, *The Articles of Agreement of the International Monetary Fund and the Exchange Control Regulations of Member States*, 89 JOURNAL DU DROIT INTERNATIONAL (Clunet) 666 (1962); Lachman, *The Articles of Agreement of the International Monetary Fund and the Unenforceability of Certain Exchange Contracts*, 2 NEDERLANDS TIJD. V. INT. RECHT 148 (1955); Madsen-Myrdall, *The Bretton Woods Agreement's Article VIII, Sec 2(b)*, 25 ACTA SCANDINAVICA JURIS GENTIUM 63 (1955); Meyer, *Recognition of Exchange Contracts Under the International Monetary Fund Agreement*, 62 YALE L.J. 867 (1953); Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421 (1950); Schnitzer, *The Legal Interpretation of Art. VIII (2)(b) of the Bretton Woods Agreement*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 47TH CONFERENCE (Dubrovnik, 1956) 299 (1957); Som-

In *Pan-American Life Ins. Co. v. Blanco*,¹⁴⁵ the court only slightly touched upon the agreement indicating that the "application of the Bretton Woods Agreement involved other questions of fact and law as to which there is no proof in the record."¹⁴⁶ Subsequently, in *Menendez Rodriguez v. Pan-American Life Ins. Co.*,¹⁴⁷ this position was considered as a rejection of the defendant's contention that the agreement requires dismissal of the insured's complaint. In *Branco v. Pan-American Life Ins. Co.*,¹⁴⁸ the court simply held the agreement inapplicable "on the foregoing grounds," none of which refers to the agreement itself. On the contrary, the Louisiana court of appeal in *Theye y Ajuria v. Pan-American Life Ins. Co.*¹⁴⁹ decided the case relying squarely on article VIII(2)(b), but without raising any question involved in the applicability of the agreement to the case before the court. The same approach was later adopted by the Florida Supreme Court in *Confederation Life Ass'n v. Ugalde*.¹⁵⁰ In *Ugalde*, the court held that "Florida Courts [were] . . . obligated by the International Monetary Fund Agreement to apply the cited Cuban Laws to the contracts here involved."

As simple as the treaty provision may look, its vague language is bound to become the crux of any litigation involving the agreement. The first question arises as to the meaning of the term "exchange contracts." It may mean a particular type of contract involving exchange in the sense of a transaction intended to transfer capital from one monetary system to another, or it may be understood to include any type of contract, provided that money is included as part of the contractual scheme, involved in one way or another, in international payments. An attempt to find a reasonable interpretation has to start from the fact that no definition is supplied by the agreement nor does the history of its drafting supply any indication as to the intended meaning to be given the term, except that the first drafts used "exchange transactions" instead of "exchange contracts." The first drafts added the phrase "in the territory of one member involving currency of another." This qualification was later changed into its present language.¹⁵¹ Consequently, a literal interpretation of the term used must be attempted. The fact that the agreement utilizes the specialized term of "exchange contracts," and not only "contracts involving currency of any member," would indicate that the transaction to be covered by this provision cannot include just any contract involving foreign currency but only a specified type of contract, namely, exchange contracts used for the

merich, *Foreign Exchange Laws as Defense to Actions in the United States Courts*, 1 AM. J. COMP. L. 401 (1952).

145. 311 F.2d 424 (5th Cir. 1962).

146. *Id.* at 427.

147. 311 F.2d 429 (5th Cir. 1962).

148. 211 F. Supp. 219 (S.D. Fla. 1963).

149. 154 So.2d 450 (La. App. 1963); *aff'd*, 161 So.2d 70 (La. 1964).

150. Nos. 32,780, 32,803, Fla., Feb. 24, 1964.

151. DEP'T STATE, PROCEEDINGS AND DOCUMENTS OF THE INTERNATIONAL MONETARY AND FINANCIAL CONFERENCE, BRETTON WOODS, 1944, 54, 334, 502, 543, 576, 655, 671 (1948).

specific purpose of transferring money from one monetary system to another. This interpretation excludes other types of contracts, *i.e.*, the non-exchange type. This category would include sale of goods, employment, or insurance contracts which involve monetary consideration flowing one or both ways, without making such monetary consideration a means for international transfer of capital. The goods to be acquired, the work to be done, the insurance to be bought, are the main characteristics of such contracts, making the possible international implication of the transfer of the monetary consideration simply an incidental matter. The same result may be reached by considering the broader aspects involved in treaty interpretation—the choice between liberal or strict interpretation. From the underlying scope of the agreement to avoid rather than to foster controls and restrictions on the international movement of currencies, as well as from the fact that the provision imposes a restriction on the sovereign adjudicating power inherent in members' sovereignty, it may be assumed that the provision expressed in Article VIII(2)(b) of the agreement is an exception imposed upon the free movement of capital and upon the presumed plenitude of powers vested in members. These factors would seem to require a strict, rather than liberal, interpretation.

Limiting the application of the term "exchange contracts" to transactions serving directly and primarily international transfers of capital, further limitations flow from the agreement. These are that such contracts "involve the currency of *any member* and which are contrary to the exchange *control* regulations of *that member* maintained and imposed *consistently* with this Agreement . . ." The first limitation calls not only for the application to exchange contracts involving the currency of a member country and not others, but it also eliminates exchange regulations other than those which qualify as exchange controls, thus excluding exchange restrictions. In this respect, the agreement itself draws a clear distinction between exchange controls and exchange restrictions by providing, *inter alia*, that member countries may

exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which unduly delay transfers of funds in settlement of commitments, except as provided in article VII(3) and XIV(2).¹⁵²

This provision introduces an additional question which cannot be overlooked, namely, whether insurance contracts are "current transactions." Luckily, this term is defined in the agreement as "payments which are not for the purpose of transferring capital."¹⁵³ This definition seems to fit contracts serving non-transfer purposes, like employment, insurance,

152. Art. VI(3).

153. Art. XVIII(i).

pension and similar agreements. Finally, in every case the unenforceability of an "exchange contract" in violation of exchange controls of the member country depends not only on the proof that such controls have been "maintained and imposed consistently with this Agreement,"¹⁵⁴ but also, that such controls originate from the member country whose currency is involved. Regulations enacted by member countries involving other than their own currency remain, therefore, outside of the scope of article VIII(2)(b).

These brief considerations suggest not only that weighty arguments may be advanced for the proposition that insurance contracts do not fall into the class of exchange contracts, but also, that they may be classified as current transactions, or as transfers of funds "in settlement of commitments," particularly since, in most cases, none of the qualifications in article VI(3), article VII(3) (limitations imposed by a formal declaration of a member and the Fund or article XIV(2) (exceptions allowed for the post-war period), apply. It is also manifest that the courts which are resolved to rely in their decisions on article VIII(2)(b) have a long and difficult way to justify its application.

In conclusion, a few remarks are in order regarding the interpretation given to article VIII(2)(b) by the Executive Directors of the Fund.¹⁵⁵ Here again, the language of the agreement must be carefully read: "Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Directors for their decision"¹⁵⁶ This provision expressly limits the power of interpretation conferred upon Executive Directors to controversies arising between the Fund and its members or between members of the Fund. The power does not include questions arising between private litigants in the courts. Consequently, these interpretative decisions have, at best, the authority of international administrative rulings binding upon the executive branches of the participating governments and are, as such, at least in this country, not binding on the courts.¹⁵⁷ Even if the interpretation should be considered binding, it resolves no questions of coverage.¹⁵⁸

154. Art. VIII(2)(b).

155. Text in 14 Fed. Reg. 5208 (1949), and *Theye y Ajuria v. Pan-American Life Ins. Co.*, *supra* note 138, at 543. *Contra*, *International Bank for Reconstr. & Dev. & Internat'l Monetary Fund v. All America Cables & Radio Inc.*, No. 9362, F.C.C., discussed in GOLD, *THE FUND AGREEMENT IN THE COURTS* 20 (1962).

156. Art. XVIII(a).

157. *Sullivan v. Kidd*, 254 U.S. 433 (1921); 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 267 (1943).

158. For a discussion of American cases, see GOLD, *THE FUND AGREEMENT IN THE COURTS* (1962). For a recent case, see *Banco do Brasil, S.A. v. A.C. Israel Com. Co.*, 12 N.Y.2d 371, 239 N.Y.S.2d 872 (1963) (art. VIII(2)(b), no basis for damages). Cuba's withdrawal from the International Monetary Fund was announced on November 14, 1960. 43 DEP'T STATE BULL. 945 (1960). Nevertheless, Cuba still appears as a member. 1960 UNITED NATIONS YEARBOOK (same in the volume for 1961). Such withdrawal is possible under article

The act of state doctrine also appeared in other types of litigation.¹⁵⁹ The traditional force of the doctrine was reaffirmed in *National Institute of Agrarian Reform v. Kane*.¹⁶⁰ In *Kane*, the plaintiff brought an action against the Institute for damages arising out of the confiscation of assets owned by a Cuban corporation in which he had a majority interest. The defendant invoked the act of state doctrine alleging that the acts of confiscation included assets situated in Cuba and which belonged to a Cuban corporation, and therefore, cannot be reviewed by a foreign court. The defendant's attempt to avoid the impact of the doctrine by alleging that the acts were in violation of international law, that they were contrary to the public policy of the forum, and that the Department of State had announced the effect of such decrees to be determined by the courts, was unsuccessful. Distinguishing the *Sabbatino* case as one which was brought by an arm of the Cuban government demanding affirmative enforcement, the court found that the plaintiff here, an American national, sought to enforce a claim based on an alleged conversion committed in Cuba by an allegedly invalid governmental act, and declined to "declare the invalidity of a Cuban decree as a basis for creating a right of recovery in the plaintiff."¹⁶¹ In conclusion, the court held that to declare an act of a foreign government, issued within its jurisdiction, invalid, would amount to a "denial of the sovereignty of a foreign state," as well as

XV(1) of the agreement. In *Stephen v. Zivnostenska Banka Nat'l Corp.*, 140 N.Y.S.2d 323 (1955), the court held that once the membership of the country whose currency regulations are involved, has ceased to be a member of the Fund, no "valid reason currently exists to frustrate our public policy, as expressed in the controlling statute, and thereby allow Czechoslovakia to take advantage of one of the privileges of fund membership . . ." *Id.* at 326.

159. Other cases involving the act of state doctrine include: *Banco do Brasil, S.A. v. Israel Commodity Co.*, 215 N.Y.S.2d (1961) (exchange controls); *Gonzales v. Industrial Bank of Cuba*, 227 N.Y.S.2d 456, 459 (1961) (negotiable instruments); *Schwartz v. Compania Azucarera Vertientes-Camaguay de Cuba*, 217 N.Y.S.2d 711 (1961), 240 N.Y.S.2d 247 (1962) ("intervened" business); *R.C.W. Supervisor, Inc. v. Cuban Tobacco Co.*, 220 F. Supp. 453 (S.D.N.Y. 1963) (trade-marks of a nationalized corporation); *United States v. Frank*, 223 F. Supp. 313 (S.D.N.Y. 1963) (contracts with a subsequently expropriated corporation); *Calderone v. Naviera Vacuba S.A.*, 325 F.2d 77 (2d Cir. 1963) (nationalized Cuban corporation maintaining third-party action).

160. 153 So.2d 40 (Fla. 3d Dist. 1963). In *Jorge v. Antonio Co.*, 19 Fla. Supp. 101, 105 (Cir. Ct. 1961), the court considered the "intervention" in a Cuban corporation's business by the Cuban government as an act of sovereignty and consequently, "entitled to the same recognition and sanctity as the acts of any other foreign government so recognized by our country." The intervention was for "reasons in the public interest, and . . . not for purely political, persecutory, discriminatory, racial or confiscatory motives." *Id.* at 108. As such, these acts are "governed and controlled solely by laws, decrees, resolutions and proclamations of the Republic of Cuba The legality and effect of the seizure and intervention . . . and the rights of the government intervenor and of the former stockholders, directors, officers . . . are matters which this court should not undertake to determine." *Id.* at 109. On the ground that "neither the individual plaintiff, a national of Cuba, nor the corporate plaintiff, a Cuban corporation, has a constitutional right to sue in this court," and the matters involved are "unrelated to this country, judicial circuit and state," the court dismissed the ground of *forum non conveniens*. *Id.* at 110. See *Man, Confiscation of Corporations, Corporate Rights and Corporate Assets and the Conflict of Laws*, 11 INT'L & COMP. L.Q. 471 (1962).

161. *National Institute of Agrarian Reform v. Kane*, 153 So.2d 44 (Fla. 3d Dist. 1963).

"violate the tradition of judicial reluctance to act in areas of executive prerogative."¹⁶² Relying on *Underhill v. Hernandez*,¹⁶³ the court, couching its decision in terms of jurisdiction, held that it lacked jurisdiction over the subject matter and dismissed the case.

The act of state doctrine in its original function was invoked in the habeas corpus proceedings incidental to the extradition of Perez Jimenez¹⁶⁴ who alleged that the acts for which extradition was requested were executed by him in the "exercise of or under the color of his sovereign authority," and, therefore, not open to judicial review. Taking advantage of the accusation that he was a dictator, the petitioner alleged that this made him a sovereign and made his acts sovereign acts, including improprieties charged to him by the Venezuelan government. Regardless of the time-honored adage, turpitudinem suam allegans nemo auditur,¹⁶⁵ the court took pains to explain that in spite of the now gladly accepted accusations of dictatorship, the appellant still was not in fact or in law "the sovereign government of Venezuela within the Act of State Doctrine,"¹⁶⁶ nor were acts charged to him "acts of the Venezuelan sovereignty . . . but for the private financial benefit of the appellant. They constituted common crimes in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an Act of State."¹⁶⁷

Gradually, the attitude holding nationalization inherently illegal has lost considerable weight in the courts.¹⁶⁸ Even though the extraterritorial effect will remain a constant source of difficulty, it may be said that the principle of complete sovereignty over a nation's natural resources has been generally accepted.¹⁶⁹ The underlying principles have been best expressed by a 1962 resolution of the General Assembly of the United Nations, which declared that the "exploration, development and disposition of such resources as well as the import of foreign capital required for the purposes, should be in conformity with the rules and conditions

162. *Ibid.*

163. 168 U.S. 250 (1897).

164. *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962).

165. "One who alleges his own infamy is not to be heard." BLACK, LAW DICTIONARY (4th ed. 1951).

166. *Jimenez v. Aristeguieta*, *supra* note 164, at 557.

167. *Id.* at 558.

168. FOUILLOUX, LA NATIONALISATION ET LE DROIT INTERNATIONAL (1962); Alfonsin, *La Regulación de las Expropiaciones y Nacionalizaciones desde el Punto de Vista de Derecho*, ANUARIO URUGUAYO DE DERECHO INTERNACIONAL 27 (1962); Domke, *Nationalization of Foreign-Owned Property and the Act of State Doctrine: The Present American Attitude Towards Nationalization of Foreign Owned Property*, 1963 DUKE L.J. 281; *Expropriation in International Law*, 48 IOWA L. REV. 878 (1963). Cf. *Expropriation of American Owned Property by Foreign Governments in the Twentieth Century*, 2 INT'L LEG. MAT. 1066 (1963).

169. UNITED NATIONS, THE STATUS OF PERMANENT SOVEREIGNTY OVER NATURAL WEALTH AND RESOURCES AND REPORT OF THE COMMISSION OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES (1962); Seidl-Hohenveldern, *International Organizations and the Protection of Private Property*, 90 JOURNAL DU DROIT INTERNATIONAL (Clunet) 627 (1963).

which peoples and nations freely consider to be necessary or desirable."¹⁷⁰ Therefore, the United Nations declared the principle that the "capital imported and the earnings on that capital shall be governed by the term thereof, by national legislation in force, and by international law." With regard to nationalization, the resolution declared that it shall be based "on grounds or reasons of public utility, security or the national interests which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law," adding, that in case of controversy, the national jurisdiction of the state taking such measures shall be exhausted, and use should be made of arbitration as well as international adjudication.

Such profound changes in attitudes, of course, increase the probability of interference on the part of local authorities, with foreign holdings, which at the same time, are encouraged as a means of contributing to the free development of other nations' economic potential. The United States has undertaken a complex action to counteract encroachments on United States foreign economic interests, particularly investments. One action took on the form of a guarantee offering American investors protection not only against difficulties in converting foreign earnings or investments into dollars, but also against losses in investments due to war, revolution or insurrection.¹⁷¹ To encourage the participation of private enterprises in the economic development of foreign countries, the President is expected to take

appropriate steps to discourage nationalization, expropriation, confiscation, seizure of ownership or control, of private investment and discriminatory and other actions having the effect thereof, undertaken by countries receiving assistance under this Act, which divert available resources essential to create new wealth, employment, and productivity in those countries and otherwise impair the climate for new private investment essential to the stable economic growth and development of those countries¹⁷²

170. 57 AM. J. INT'L L. 710 (1962); Mr. Stevenson's letter, 57 AM. J. INT'L L. 406 (1963).

171. Presently regulated by arts. 221-24 of the Act for International Development of 1961, 75 Stat. 424 (1961), as amended by § 104 of the Foreign Assistance Act of 1963, 77 Stat. 379 (1963). The term expropriation is defined as an "abrogation repudiation, or impairment by any foreign government, of its own contract with an investor, where such abrogation . . . is not caused by the investor's own fault or misconduct, and materially and adversely affects the continued operation of the project." Miller, *Protection of United Nations Investments Abroad: The Investment Guarantee of the United States Government*, 32 GEO. WASH. L. REV. 288 (1963). See also Note, *The Investment Guaranty Program: Problems of Administration*, 64 COLUM. L. REV. 315 (1964).

172. Foreign Assistance Act of 1963, § 301, amending § 601(b) of the Foreign Assistance

In an attempt to discourage wanton expropriation another method was adopted in the Act for International Development of 1962 and amended in the Foreign Assistance Act of 1963. This provision charged the President to suspend assistance to any country which, on or after January 1, 1962,

(1) has nationalized or expropriated or seized ownership or control of property owned by any American citizen or by any corporation . . . not less than 50% beneficially owned by United States citizens, or

(2) has taken steps to repudiate or nullify existing contracts or agreements with any United States citizen or corporation . . . no less than 50% beneficially owned by United States citizens, or

(3) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned . . .¹⁷³

Assistance will be suspended if such country fails within a reasonable time, usually six months after its action has been taken, to submit the claims to arbitration or

to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions . . .¹⁷⁴

Furthermore, no monetary assistance may be made to any country which will be used to compensate owners for expropriated or nationalized property. Whenever the President shall find that assistance has been used for such purpose, no assistance shall be granted "until appropriate reimbursement is made to the United States for sums so diverted." Finally, no assistance shall be available after December 31, 1965, to "any less developed country which has failed to enter into an agreement with the President to institute the investment guaranty program."¹⁷⁵

Act of 1961, *supra* note 171. See Clubb, *Incentives to Private United States Investment Abroad Under the Foreign Assistance Program*, 72 YALE L.J. 475 (1963); Lillich, *The Protection of Foreign Investment and the Foreign Assistance Act of 1962*, 17 RUTGERS L. REV. 405 (1963); Hammond, *An Evaluation of the Investment Guaranty Program*, 1 MAINE L. REV. 67 (1963).

173. Foreign Assistance Act of 1963, 77 Stat. 379, § 301(e), amending § 620 of the Foreign Assistance Act of 1961.

174. *Ibid.*

175. Foreign Assistance Act of 1963, 77 Stat. 379, § 301(i).

VII. MISCELLANEOUS

A. *Diplomatic and Consular Privileges*

Rules of international law regarding diplomatic and consular privileges and immunities have been restated in two draft conventions prepared by the International Law Commission of the United Nations. The 1961 Vienna Convention on Diplomatic Relations¹⁷⁶ has been followed by the 1963 Convention on Consular Relations,¹⁷⁷ with the optional protocol relating to the settlement of disputes, all signed by the United States, but not yet ratified. Two bilateral consular conventions have also been signed in 1963 by the United States, one with Japan¹⁷⁸ and the other with Korea.¹⁷⁹

Diplomatic immunity was pleaded by a member of the Cuban mission to the United States when charged with conspiracy to commit sabotage and violate the Foreign Agents Registration Act. In *United States v. Fitzpatrick*,¹⁸⁰ a Cuban claiming the title of "attache and resident member of the permanent mission of Cuba to the United Nations," sought release from custody on a writ of habeas corpus alleging lack of jurisdiction. The court held that the petitioner had no diplomatic immunity in view of limitations on that privilege to functions within the scope of his position, both under article 105 of the Charter of the United Nations and under the Headquarters Agreement,¹⁸¹ as well as under general principles of international law. The court also declined to accept the petitioner's contention that exclusive jurisdiction is vested in the Supreme Court under the Constitution,¹⁸² and held that the constitutional provision was only applicable to diplomatic representatives to the United States and not to those accredited to international organizations, even if they should have their seat within the United States, and also, because the petitioner's position was not that of a "public minister."¹⁸³

With regard to consular privileges, the response by the Department of State to an inquiry from the Panamanian Ministry of Foreign Affairs

176. Text in 55 AM. J. INT'L L. 1064 (1961). See RESTATEMENT §§ 76-85.

177. Text in 56 AM. J. INT'L L. 276 (1962). The United States also signed the *Optional Protocol Relating to Settlement of Disputes*. Note, *Consular Immunity: In Law and in Fact*, 47 IOWA L. REV. 668 (1962). Consular functions regarding arrest of nationals are compiled in 57 AM. J. INT'L L. 411 (1963).

178. Consular Convention with Japan, signed March 22, 1963, 48 DEP'T STATE BULL. 546 (1963); text in 2 INT'L LEG. MAT. 746 (1963).

179. T.I.A.S. No. 5469.

180. 214 F. Supp. 425 (S.D.N.Y. 1963). Subsequently, the petitioner was released to Cuba in exchange for American nationals. N.Y. Times, April 23, 1963, p. 1.

181. 61 Stat. 756 (1947).

182. U.S. CONST. art. III, § 2(2).

183. Comment, *United States Jurisdiction Over Representatives to the United Nations*, 63 COLUM. L. REV. 1066 (1963); Visick, *Regulating Nondiplomatic Activities of Representatives of Foreign Countries in the United States*, 31 GEO. WASH. L. REV. 977 (1963); Gormley, *Privileges and Immunities of Personnel of Regional International Organizations*, 32 U. CINC. L. REV. 131, 279 (1963).

concerning a civil action for defamation and slander against a Panamanian consul in the United States may be mentioned.¹⁸⁴ The Department replied that it is for the courts to decide whether or not a particular act of a consul is one within his official capacity.

B. *Extradition*

With regard to treaties concerning extradition, it was reported in the previous *Survey* that the convention with Brazil has been ratified by the United States in 1961 while Brazil took no action. Nevertheless, an additional protocol was signed on June 18, 1962, clarifying the prohibition against extradition of nationals of the requested country.¹⁸⁵ Additional conventions were signed with Sweden in 1961,¹⁸⁶ and with Israel,¹⁸⁷ both ratified.¹⁸⁸

A prominent case involving various aspects of the law of extradition, arising both under domestic as well as treaty law, arose from the commitment to custody for extradition of the former president of Venezuela, Perez Jimenez. In the habeas corpus proceedings,¹⁸⁹ the court clearly restated the limited grounds for review. These were noted to be jurisdiction of the extradition magistrate, extraditability under the treaty for offenses charged, and reasonable grounds to support the applicant's guilt. After disposing of the petitioner's plea of sovereign immunity, discussed above, and the alleged political nature of the crimes,¹⁹⁰ and holding findings of the court below on this point not reviewable, the court concentrated on the question of whether or not the crimes charged to the petitioner were extraditable under the treaty with Venezuela of 1922. In the opinion of the court, a prima facie case had been established both by the evidence

184. 57 AM. J. INT'L L. 411 (1963). A federal court would take jurisdiction to enjoin a foreign vice-consul acting without exequatur. *Dominican Republic v. Peguero*, 225 F. Supp. 342 (S.D.N.Y. 1963).

185. Additional Protocol to the Extradition Treaty of January 13, 1961 (text in 44 DEP'T STATE BULL. 164 (1961)), signed on June 18, 1962 (text in 57 AM. J. INT'L L. 125 (1963)); Accioly, *Tratado de Extradicao com os Estados Unidos*, 15 (29/30) BOLETIM DA SOCIEDADE BRASILEIRA DE DIREITO INTERNACIONAL 57 (1959).

186. 49 DEP'T STATE BULL. 1022 (1963).

187. T.I.A.S. No. 5476; 49 DEP'T STATE BULL. 1022 (1963); 50 DEP'T STATE BULL. 33 (1964).

188. The Extradition Treaty with Mexico (1899), as amended, 1902, 1925, and 1939, is discussed by Franco, *El Tratado de Extradicion entre Mexico y Estados Unidos*, (38) EL FORO (4a ep.) 93 (1962); Hernandez Romo, *El Amparo contra la Extradicion*, (38) EL FORO (4a ep.) 103 (1962). Cf. *United States v. Marasco*, 215 F. Supp. 953 (S.D.N.Y.), *aff'd*, 325 F.2d 562 (2d Cir. 1963); *Merino v. United States Marshall*, 326 F.2d 5 (9th Cir. 1964).

189. *Jimenez v. Aristeguieta*, *supra* note 164.

190. Garcia Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962). See also *War Crimes and the Principle of Non-Extradition of Political Offenders*, 9 WAYNE L. REV. 269 (1963); Evans, *Reflections Upon the Political Defense in International Practice*, 57 AM. J. INT'L L. 1 (1963); de Vries & Rodriguez Novas, *Territorial Asylum in the Americas: Latin American Law and Practice of Extradition*, 5 INTER-AMERICAN L. REV. 61, 72 (1963). Cf. *In re Gonzales*, 217 F. Supp. 717 (S.D.N.Y. 1963).

produced, by the "findings of the highest court [of Venezuela] that the charges and evidence established cause for prosecution and arrest, the warrant of arrest, and [by] a substantial quantity of evidence submitted to the Supreme Court of Justice of Venezuela."¹⁹¹ Thus, the crucial question remained as to whether or not these charges are offenses for which extradition may be demanded under the treaty. The court found the charges to be within the scope of article II, paragraphs 14, 18, and 20 of the treaty, dealing with "embezzlement or criminal malversation,"¹⁹² receiving property "knowing the same to have been unlawfully obtained," and "fraud or breach of trust." However, in deciding this issue, the court did not delve into the Venezuelan criminal code in force at the time of the alleged commission of the charges, nor did it establish a definition of the crimes under United States federal or state law, in order to satisfy the generally accepted principle of double criminality, *i.e.*, by showing that acts charged are punishable both under the laws of the requesting as well as requested country. This was particularly important here, since the question was complicated by the fact that the criminal code of Venezuela was changed after the ratification of the treaty, thus opening the possibility that crimes included in the treaty did not coincide with those punishable under the criminal code in force at the time of the alleged commission of the crimes. Furthermore, a proper test of double criminality necessarily brings into the picture American law, with the added complication as to choice, or cumulation, of both federal and state law. Instead, the court defined criminal malversation by replying on *Webster's New International Dictionary*, the *Oxford English Dictionary*, and *Black's Law Dictionary*, which are at best, rather weak sources of authority for the question presented.

Subsequent attempts on the part of the petitioner to be released on bail remained unsuccessful,¹⁹³ the court held that "no amount of money could answer the damage that would be sustained by the United States were the applicant to be released on bond, flee the jurisdiction, and be unavailable for surrender," adding that the obligation "of this country under the treaty with Venezuela is of paramount importance."¹⁹⁴ Finally, extradition was ordered by the Secretary of State,¹⁹⁵ and, after an equally unsuccessful appeal for stay of extradition to the Supreme Court,¹⁹⁶ Perez Jimenez was extradited to Venezuelan authorities in Miami on August 16, 1963.

191. *Jimenez v. Aristequieta*, 311 F.2d 547 (5th Cir. 1962).

192. *Cf. In re Wise*, 168 F. Supp. 366, 370 (S.D. Tex. 1957).

193. *Jimenez v. Aristequieta*, 314 F.2d 649 (5th Cir. 1963).

194. *Id.* at 653.

195. 49 DEP'T STATE BULL. 364 (1963). Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1278 (1962).

196. *Jimenez v. United States District Court*, 84 Sup. Ct. 14 (1963).

C. *Aliens*

The influx of Cuban refugees into Florida presented local as well as federal authorities with a number of problems.¹⁹⁷ In 1962, Congress enacted the Migration and Refugee Assistance Act¹⁹⁸ which gave the President authority to determine what assistance to refugees would be "in the interest of the United States." Refugees were defined as aliens who, (1) because of persecution or fear of persecution on account of race, religion, or political opinion, fled from a nation or area of the Western Hemisphere; (2) cannot return thereto because of fear of persecution on account of race, religion, or political opinion, and (3) are in urgent need of assistance for the essentials of life. Means so provided may also be used for assistance to state or local public agencies

providing services for substantial numbers of individuals who meet the requirements of subparagraph (3) (other than clause C) for (a) health services and educational services to such individuals, and (b) special training for employment and services related thereto; for transportation and resettlement, for the establishment of projects for employment or refresher professional training¹⁹⁹

As indicated in another study,²⁰⁰ aliens may appear in Florida courts as plaintiffs. These suits have become more numerous and state courts, in most cases, have shown no reluctance to keep their doors open. In *Confederation of Life Ass'n v. Ugalde*,²⁰¹ the court held that "the courts of Florida . . . [are] open to Cuban citizens, while here, to seek redress for a wrong remediable in law, under section 4 of the Declaration of Rights of Florida."²⁰² The same position was taken in *Lorido v. Pan-American Life Ins. Co.*,²⁰³ where the court declined to "deny justice to Cuban nationals, . . . [rejecting] the contention that the courts of this country should not afford a forum to these distressed plaintiffs who find themselves homeless and without remedy in their own country." The court supported its position with a complete quotation from the poem inscribed on the Statue of Liberty.²⁰⁴

197. Mitchell, *The Cuban Refugee Program*, 25 SOCIAL SECURITY BULL. 3 (1962); Martin, *United States Outlines Policy Toward Cuban Refugees*, 48 DEP'T STATE BULL. 983 (1963).

198. 76 Stat. 121 (1962).

199. Chommie, *The University of Miami Program for Cuban Lawyers: A Report*, 5 INTER-AM. L. REV. 177 (1963).

200. Bayitch, *Aliens in Florida*, 12 U. MIAMI L. REV. 129 (1958).

201. 151 So.2d 315 (Fla. 3d Dist. 1963).

202. *Id.* at 323.

203. 19 Fla. Supp. 167 (Cir. Ct. 1962).

204. *Contra*, *Jorge v. Antonio Co.*, 19 Fla. Supp. 101 (Cir. Ct. 1962), wherein the court stated that "this court is not obliged to try suits involving the laws of a foreign country or controversies between citizens of foreign countries and their government. Citizens of foreign countries, such as Cuba, should look to the law of their own country for relief. Comity does not require that this controversy be tried by this court." The case was dismissed under the doctrine of forum non conveniens. In contrast, this doctrine was found inapplicable in

The legal status of refugees was further explored in *Blanco v. Pan-American Life Ins. Co.*²⁰⁵ In order to decide the question of whether or not the present Cuban government has the international authority to subject, in personam, Cuban refugees to its municipal law, the court adopted the theory of political refugees falling into the "category of *res nullius*," and found that "allegiance is an obligation of fidelity and obedience which the individual owes his government in return for the protection which he receives." This fidelity was renounced by the Cuban refugees. Therefore, these "former political citizens of a Cuba that has ceased to be (with some inchoate allegiance to a Cuba they hope may come into existence sometime in the future), are at present political citizens of nowhere."²⁰⁶ However, they are "civil citizens of Florida based on their domicile here, and they are possessed of our municipal rights and obligated for domestic municipal duties." In view of this as well as the territorial application of the Cuban decrees involved, the court concluded that these refugees "are not subject to its [Cuba's] in personam jurisdiction," in the sense of legislative power.²⁰⁷

Greater difficulties have arisen with regard to political activities of Cuban refugees, involving delicate duties imposed by international law and conventions of the asylum country,²⁰⁸ particularly where revolutionary or even military actions were involved. In the beginning, the application of controlling federal statutes was rather lenient, particularly in connection with the Bay of Pigs invasion attempted by Cuban nationals. Later, after the break with the Cuban Revolutionary Council, the Department of State took a stronger position.²⁰⁹ With regard to international obligations, the Havana Convention on Duties and Rights of States in the Event of Civil Strife²¹⁰ controls, while the amendment signed in

Menendez Rodriguez v. Pan-American Life Ins. Co., 31 F.2d 429 (5th Cir. 1962), wherein the court held that courts in Cuba do not present the necessary alternative. Cuban refugees here on a temporary non-immigrant visa have been held to be unable to rightfully and in good faith, make a residence purchased in Florida, their "permanent home" within art. 10, § 7 of the Florida Constitution, and therefore, not entitled to homestead tax exemption. *Juarrero v. McNayre*, 157 So.2d 79 (Fla. 1963).

205. 221 F. Supp. 219 (S.D. Fla. 1963).

206. *Id.* at 228.

207. *Id.* at 229.

208. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* (1962); Lauterpacht, *Revolutionary Activities of Private Persons Against Foreign States*, 22 AM. J. INT'L L. 105 (1928); Powers, *Treason by Domiciled Aliens*, MILITARY L. REV. 123 (July, 1962); Preuss, *International Responsibility for Hostile Propaganda Against Foreign States*, 28 AM. J. INT'L L. 649 (1934). See also THOMAS & THOMAS, *THE ORGANIZATION OF AMERICAN STATES* 338 (1963). The Logan Act, 18 U.S.C. § 953, which prohibits correspondence or intercourse with any foreign government, was involved when a private citizen attempted to halt loading of ransom goods in exchange for Cuban invaders held prisoners in Cuba. A municipal judge held the citizen guilty of disorderly conduct. The question also came up in a federal court in Miami. Miami Herald, March 24, 1963, p. 16-A. However no cases have been reported.

209. 48 DEP'T STATE BULL. 600 (1963). See *United States v. Esperdy*, 203 F. Supp. 389 (S.D.N.Y. 1962), *aff'd in part and rev'd in part*, 315 F.2d 673 (2d Cir. 1963) (American national lost citizenship because of membership in Castro's army).

210. 46 Stat. 2749 (1928).

1957²¹¹ has not yet been ratified by the United States. The general attitude on the part of Latin American countries is reflected in the draft for an interamerican Convention Regarding the Regime of Political Exiles, Asylees, and Refugees,²¹² adopted in 1953 by the Interamerican Council of Jurists. An expression of attitudes prevailing in the United Nations might be found in the Draft Code of Offenses against Peace and Security of Mankind,²¹³ drafted by the International Law Commission of the United Nations.

211. Protocol to the Convention of Feb. 20, 1928, on Duties and Rights of States in Event of Civil Strife (signed in Washington, May 1, 1957, obtained Senate advice and consent in 1959); see text in 284 U.N.T.S. 201. Podesta Costa, *La Revisión de la Convención Interamericana sobre Derecho y Deberes de los Estados en Caso de Luchas Civiles*, 1949 INTER-AMERICAN JUR. YB. 9 (1950); THOMAS & THOMAS, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 215 (1956).

212. 5 ANNALS OF THE O.A.S. 165 (1953).

213. 1951 YB. OF THE U.N. 842 (1952). See also 45 AM. J. INT'L L. 123 (Supp. 1951).