Maryland Journal of International Law

Volume 20 | Issue 1 Article 6

Survey of International Law

SURVEY OF INTERNATIONAL LAW

This survey provides brief digests of cases that represent a variety of aspects of international law that have appeared in the Courts of Appeals for the Fourth Circuit and D.C. Circuit, and the appellate courts of Maryland, the District of Columbia, Virginia, West Virginia, North Carolina, South Carolina and the Court of International Trade. The cases are grouped in topical categories and references are given for further research.

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I. CRIMINAL

AS WHEN ENTERING THE UNITED STATES, THE BORDER SEARCH EXCEPTION TO THE FOURTH AMENDMENT APPLIES TO PERSONS AND EFFECTS LEAVING THE UNITED STATES. *United States v. Oriakhi*, 57 F.3d 1290 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 400 (1995).

Appellant, Daniel Oriakhi (Oriakhi), was indicted by a grand jury in the District of Maryland for possessing heroin with the intent to distribute, and for participating in a conspiracy to distribute heroin. During Oriakhi's trial the United States introduced evidence seized in two separate warrantless searches conducted by U.S. Customs officials. The first search was made pursuant to the practice of U.S. Customs Inspectors to examine "unusual shipments," including shipments bound for narcotics source countries or countries which are subject to embargo and shipments accompanied by suspicious or incomplete paperwork. This search was effected upon the contents of a 40-foot

container being shipped from Port Elizabeth, New Jersey to Lagos, Nigeria by the "Agoda Smith Company." "Agoda Smith" was an alias employed by Oriakhi. Some of the contents of this container were subsequently used as evidence by the United States in Oriakhi's trial. The second search at issue was effected at New York City's J.F.K. Airport upon Oriakhi's luggage, which was revealed by x-ray examination to contain two 9mm semi-automatic handguns and ten boxes of ammunition. Upon manual inspection of the luggage's contents, Customs inspectors also found $10,000 in U.S. currency which Oriakhi had not reported to Customs as he was required to do under federal currency reporting laws.

Motions to suppress evidence filed by Oriakhi were denied by the United States District Court for the District of Maryland. Oriakhi argued on appeal to the Fourth Circuit that the two searches violated his Fourth Amendment rights because they were conducted without probable cause or even reasonable suspicion. Although Oriakhi did not dispute that the Port Elizabeth and J.F.K. searches were conducted at the functional equivalent of the United States border[1] and that routine searches of persons and effects entering the country may be conducted at the border without a warrant, probable cause, or any level of individualized suspicion, he contended that this border search exception to the Fourth Amendment does not apply to persons and effects leaving the country.

Held: Affirmed. Although the principle case articulating the border exception, *United States v. Ramsey*, 431 U.S. 606 (1977), involved the searching of mail entering the United States which was used to import heroin, the Fourth Circuit held that the principles articulated in *Ramsey* also apply to the sovereign interest of protecting and monitoring exports from the country. The Court joined the several other circuit courts which have held that the *Ramsey* border search exception extends to all routine searches at the nation's borders, irrespective of whether persons or effects are entering or exiting the country.[2] Both searches of Oriakhi's effects began as routine border searches, and were expanded only as further information developed. Thus, both fell within the border search exception to the Fourth Amendment. *Significance:*

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1. See Almeida-Sanchez v. United States, 41 U.S. 266, 272-73 (1973).

2. See United States v. Ezeiruaku, 936 F.2d 136, 143 (3rd Cir. 1991); United States v. Hernandez-Salazar, 813 F.2d 1126, 1137 (11th Cir. 1987); United States v. Des Jardins, 747 F.2d 499, 504 (9th Cir. 1984); United States v. Udofot, 711 F.2d 831, 839-40 (8th Cir. 1983), *cert denied*, 464 U.S. 896 (1983); United States v. Ajilouny, 629 F.2d 830, 834 (2nd Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981); as cited in *Oriakhi*, 57 F.3d at 1296 n.3.

The Fourth Circuit joins five other circuits in holding the border search exception to the Fourth Amendment equally applicable to persons and effects leaving the United States as well as entering.

II. DIPLOMATIC IMMUNITY

DIPLOMATIC IMMUNITY, AS AFFORDED BY THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS, PROTECTS FOREIGN DIPLOMATIC PERSONNEL STATIONED IN THE UNITED STATES FROM A CIVIL LAWSUIT BROUGHT BY THEIR DOMESTIC SERVANT. *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996).

Appellant, Corazon Tabion (Tabion), a Philippine national, performed domestic services in the home of Appellees Faris and Lana Mufti (Mufti) for more than two years. Because Tabion believed that her low pay and long hours violated the Fair Labor Standards Act, 29 U.S.C. § 201 et. seq., she instituted suit against the Muftis in the United States District Court for the Eastern District of Virginia. The District Court found that the Muftis were protected by diplomatic immunity. The Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, provides nearly absolute civil and criminal immunity for diplomatic personnel stationed in foreign countries.[1] The Muftis are covered by the Vienna Convention because of Mr. Mufti's position as First Secretary, and later Counsellor, of the Jordanian Embassy in Washington, D.C.

In a case of first impression, the Court determined that the phrase "commercial activity" as used in one of the three exceptions to diplomatic immunity enumerated in Article 31 of the Vienna Convention did not cover the Muftis' employment relationship with Tabion. The Court ruled the suit barred by the Vienna Convention. Tabion appealed to the United States Court of Appeals for the Fourth Circuit, arguing that her domestic service for the Muftis amounted to commercial activity exercised outside the Muftis' official function. *Held: Affirmed.* The phrase "commercial activity" as it appears in Article 31(1)(c), which states an exception to diplomatic immunity from actions "relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions," was not in-

1. "The Vienna Convention became applicable to the United States by the Diplomatic Relations Act, 22 U.S.C. §§ 251-59, which repealed earlier laws governing diplomatic immunity. Both the United States and Jordan, as well as nearly 150 other countries, have signed the treaty." *Tabion*, 73 F.3d at 535 n.1.

tended by the signatories to the Vienna Convention to include day-to-day living services such as domestic help. Because such a service is incidental to daily life, diplomats are to be immune from disputes arising out of them. *Significance*: In keeping with the tradition of extremely expansive diplomatic immunity, American citizens having private disputes with foreign diplomats which do not implicate the diplomat in having engaged in commercial activities are without legal recourse.

III. FAMILY LAW

PAKISTANI CHILD CUSTODY ORDER IS GRANTED COMITY ABSENT APPELLANT'S ABILITY TO PROVE THAT PAKISTANI LAW IS SO CONTRARY TO MARYLAND PUBLIC POLICY AS TO UNDERMINE CONFIDENCE IN THE OUTCOME OF THE TRIAL. *Hosain v. Malik, en banc*, 108 Md. App. 284 (1995).

Appellant Joohi Q. Hosain appeals a trial court's ruling which upheld a Pakistani child custody order for Appellee Anwar Malik, her ex-husband.[1] Hosain and her daughter fled Pakistan some years ago. Ms. Hosain and her child settled in Baltimore. Malik remained in Pakistan and obtained a Pakistani court order granting him custody of their child. Malik then sought to enforce the Pakistani order in Maryland. The trial court upheld this order, ruling that it could be legally enforced in Maryland. Hosain appealed.

On appeal to the Court of Special Appeals of Maryland, *Held: Affirmed.* Appellant did not prove that Pakistani child custody laws are not in substantial conformity with Maryland child custody laws.

Both Hosain and Malik, at the trial court, presented expert evidence on Pakistani law. Hosain's expert characterized the child custody proceedings in Pakistan as "one-sided" because the Pakistani court never considered Hosain's side of the story in making its determinations. Malik's expert, however, pointed out that Hosain chose not to attend the proceedings in Pakistan, and had she done so she would have been afforded a fair opportunity to present evidence for her case. Additionally, Malik's expert discussed the "welfare of the child" standard employed in Pakistan child custody proceedings. This standard considers the age and sex of the child, the child's religion, and the child's

1. On remand from *Malik v. Malik*, 99 Md. App. 521 (1994) (reviewed in last year's issue, 19 Md. J. Int'l L. & Trade 168 (1995)), the Circuit Court issued a written Order on December 12, 1994 granting Mr. Malik custody of their child.

relationship with the proposed custodian. The trial court found that this standard was similar to the "best interest of the child" standard employed in Maryland child custody proceedings. Consequently, the trial court found that the Pakistani court order should be granted comity in Maryland.

The Court of Special Appeals agreed with the trial court's determinations. The Court found that Hosain was not successful in overcoming the trial court's ruling with a "preponderance of evidence" showing that the custody determination standard in Pakistan is grossly out-of-line with the standard employed in Maryland custody proceedings. The Court ruled that the Pakistani order is valid and that Pakistan was the best forum in which to make a custody decision. *Significance:* A foreign custody order will be granted comity in Maryland unless the appellant can prove, by a preponderance of evidence, that the foreign jurisdiction's custody determination standard is significantly incompatible with Maryland's custody determination standard.

IV. IMMIGRATION

ALIENS OPERATING FROM A FOREIGN OWNED BARGE ON THE OUTER CONTINENTAL SHELF WHO CONSTRUCT PLATFORMS FOR DOMESTIC OIL COMPANIES ARE NOT SUBJECT TO UNITED STATES IMMIGRATION LAWS. *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry v. Reno*, 73 F.3d 1134 (D.C. Cir. 1996).

In 1989, Heerema Marine Corporation, S.A., a Dutch-owned company, contracted to perform work for Exxon. The site of the work was the outer Continental Shelf off the coast of Santa Barbara, California. Heerema installed the foundations for oil platforms. These foundations were hauled to the installation site by barge, and then attached to the ocean floor. The alien laborers working for Heerema did not comply with United States immigration law.

United States labor unions brought suit against the Attorney General seeking to enforce United States immigration laws against the alien workers. The District Court for the District of Columbia originally granted summary judgment in favor of the unions. Upon appeal, the Circuit Court vacated and remanded. The District Court then dismissed, and the unions brought this appeal.

The Circuit Court for the District of Columbia Circuit *Held: Affirmed.* The alien workers were not subject to United States immigration law. Although 43 U.S.C. § 1331 requires aliens working on the Outer Continental shelf to comply with immigration laws, these work-

ers fell within 43 U.S.C. § 1356's statutory exception for vessels, rigs and platforms of which a majority interest is owned by citizens of a foreign nation. *Significance:* This decision provides a basis for foreign-owned companies to employ alien workers on projects on the outer Continental Shelf without the burden of compliance with United States immigration law.

CITIZENS OF THE PEOPLE'S REPUBLIC OF CHINA SEEKING STATUS ADJUSTMENT UNDER THE CHINESE STUDENT PROTECTION ACT MUST ALSO MEET THE REQUIREMENT SET FORTH IN SECTION 245 OF THE IMMIGRATION AND NATIONALITY ACT. *Qi-Zhuo v. Meissner*, 70 F.3d 136 (D.C. Cir. 1995).

Appellant Lin Qi-Zhuo, a Chinese national, applied for an adjustment of his immigration status to that of a permanent resident under the Chinese Student Protection Act (CSPA). Although Qi-Zhuo met the status adjustment requirements of the CSPA, Qi-Zhuo failed to meet the basic Immigration and Naturalization Act (INA) requirement because he entered the United States illegally in 1987. The INA only provides status adjustments to non-immigrants who have "been inspected and admitted or paroled into the United States." 8 USC §1255(a); §245(a) INA. Qi-Zhuo brought suit alleging the CSPA exempts Chinese nationals from the INA's inspection requirement.

The United States District Court for the District of Columbia denied Appellant's plea for declaratory judgment. On appeal to the United States Court of Appeals for the D.C. Circuit *Held: Affirmed.* The Court found the statutory language of the CSPA did not exclude the application of section 245 of INA to Chinese nationals seeking adjustment status under CSPA. First, principles of statutory construction require that items not present in a list of exclusions are not to be presumed excluded. Thus, the Court could not read into the statute an exemption that Congress had not included. Second, since legislative intent was unclear and inconclusive it could not override the plain language of the statute. Finally, the Immigration and Naturalization Service, the administrative agency responsible for the enforcement of both statutes, previously had concluded that Chinese status adjustment applicants under CSPA must meet all the requirements of section 245 of the INA at 8 C.F.R. § 245.9(b)(6). *Significance*: Nationals of the Peoples Republic of China who attempt to adjust their residency status under the CSPA must have entered the United States legally.

ALIENS WHO HAVE BEEN CONVICTED OF AN AGGRAVATED FELONY ARE NOT ENTITLED TO A SEPARATE DETERMINATION OF DANGEROUS-

NESS BEFORE BEING DEPORTED UNDER 8 U.S.C. § 1253 (H)(2)(B). *Kofa v. U.S. Immigration & Naturalization Service*, 60 F.3d 1084 (4th Cir. 1995).

Petitioner Kofa had two aggravated felony convictions for possession of cocaine with an intent to distribute. The Immigration and Naturalization Service (INS) issued an order to show cause as to why Kofa should not be deported. The Immigration Judge stated that despite these convictions Kofa could apply for a withholding of deportation if he could prove the he was not a danger to the U.S. and later determined that Kofa, in fact, did not present a danger. The INS filed an interlocutory appeal, taking the position that since Kofa had been convicted of a serious crime, he was statutorily ineligible to apply for such a withholding. The Board of Immigration Appeals agreed and remanded the case whereby Kofa was ordered deported. Kofa petitioned for judicial review. The only issue before the Court was whether 8 U.S.C. § 1253(h)(2)(B) requires a separate determination of dangerousness to the community when an alien has been convicted of an aggravated felony. On petition to the United States Court of Appeals for the Fourth Circuit, *Held: Denied.*

Following the rules of statutory construction, the Court found that the meaning of the statute was plain and agreed with INS that once an alien has been convicted of a particularly serious crime, that alien is ineligible for withholding without a separate finding on dangerousness. The Court therefore denied the Petitioner's request for review in each case. In addition, the statutory section in question was identical to the language in the United Nations Protocol Relating to the Status of Refugees that also refused to allow a refugee who was a danger to the host country to remain. Interpreting the United Nations Protocol, the Court clearly concluded that when an individual is convicted of an especially dangerous crime, that person is necessarily a danger to the community.

The Court's interpretation reinforces the U.S. government's power to deport any individual who presents a danger to the community based upon a conviction for a particularly serious crime. Such a position seems to be in keeping with the norms set by the international community. *Significance:* The Fourth Circuit becomes the sixth circuit to agree that a conviction of a serious crime does not require an additional finding of dangerousness before deportation.

V. INTERNATIONAL TRADE AND COMMERCIAL LAW

NATIVE AMERICAN NATION NOT FEDERALLY RECOGNIZED AND NOT DEMONSTRATING INJURY IN FACT LACKS STANDING TO CHALLENGE

CONSTITUTIONALITY OF GATT. *Cook v. United States Senate*, Nos. 95-01-00001, Slip Op. 96-34, 1996 WL 61641 (Ct. Int'l Trade 1996).

In this action for declaratory judgment in the United States Court of International Trade, Plaintiff Dale F. Cook, Sr., as Chief of "The Original Cherokee Nation," sought a ruling on the constitutionality of the Uruguay Round Agreements Act and the passage of the General Agreement on Tariffs and Trade (GATT). Claiming unspecified injury to "The Original Cherokee Nation and its citizens and inhabitants," Plaintiff made two arguments in support of his prayer for declaratory relief. First, he argued that the people of his nation were denied due process because the volume and complexity of the GATT document prohibited them from adequately informing their representatives how to vote at the time it was passed. Second, he argued that the GATT itself violates the Commerce Clause of the Constitution because it interferes with the trade relationship between the United States and the Native American nations as established by the Hopewell Treaty. As an alternative to declaratory judgment, Plaintiff petitioned for dissolution of the United States and return of all land acquired under the Hopewell Treaty to the original American Indian nations who occupied it.

On Petition to the United States Court of International Trade *Held: Defendants' Motions to Dismiss for Lack of Standing Granted.* In a memorandum opinion, the Court ruled on motions to dismiss filed by several Defendants against whom Cook complained.

After determining that the Plaintiff failed to establish an "injury in fact" as required for jurisdiction under Article III of the Constitution, the Court found that he lacked standing to challenge the constitutionality of the GATT. Even if the court had found the GATT unconstitutional, it noted that the Plaintiff still could not establish that he had been harmed by its passage. "The Original Cherokee Nation" was not among the Hopewell Treaty signatories, and its current Chief is not counted among any federally-recognized tribes using the Cherokee name. Finally, the Court found the Plaintiff lacked standing under the Uruguay Round Agreements Act, which limits private remedies solely to actions brought by the United States. The Defendants' motions were granted, and Plaintiff's action was dismissed.

While the Court interpreted subsection 3512(c)(2) of GATT as annulling Plaintiff's action against the Defendant States, it reserved judgment on the question of whether the Act's provisions with regard to standing precluded constitutional attack across the board. *Significance:* Parties who fail to establish standing under Article III of the Constitution or the statutory provisions of the GATT may not bring

actions to challenge its constitutionality.

COUNTRY OF ORIGIN FOR CERTAIN TEXTILE PRODUCTS TO BE DETERMINED BY ORIGIN OF FABRIC USED TO CREATE THE PRODUCTS. *Pac Fung Feather Co., Ltd. v. United States*, No. 95-10-01299, 1995 WL 767350 (Ct. Int'l Trade 1995).

This matter came before the Court of International Trade on the parties' cross motions for summary judgment. Plaintiff had challenged the final regulations promulgated by the United States Customs Service (Customs) concerning the rules of origin for textile and apparel products. *Held: Denied*, plaintiff's motion for summary judgment; *Granted*, defendant's cross-motion for summary judgment.

Principles for determining the origin of textile and apparel products were set forth in section 334(b) of the Uruguay Round Agreements Act (URAA), 19 U.S.C.S. § 3592 (1995).[2] These principles, simplified and paraphrased, are as follows:

> 334(b)(1): A textile or apparel item originates in Country "X" if
>
> (A):the item is wholly obtained or produced in X
>
> (B):the item is yarn, thread, etc. and
>
> (i): the constituent fibers are spun in X or
>
> (ii): the filament is extruded in X
>
> (C):the item is fabric, and the constituent fibers are transformed by a fabric-making process in X
>
> (D):the item is any other textile or apparel product wholly assembled in X from its component pieces.

> 334(b)(2): Special Rule:
>
> (A):The origin of goods under certain tariff headings and subheadings shall be determined by using (b)(1)(A) or (b)(1)(B) or (b)(1)(C), "as appropriate."

> 334(b)(3): Multicountry Rule:
>
> If the origin cannot be determined by using (b)(1) or (b)(2), then the item originates in
>
> (A):the country in which the most important assembly or

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2. Pub. L. No. 103-465, 108 Stat. 4809 (1994). President Clinton signed the URAA into law on December 8, 1994. *Pac Fung*, 1995 WL 767350 at *1.

manufacturing occurs, or

(B):if the origin cannot be determined from (b)(3)(A), then the item originates in the last country in which important assembly or manufacturing occurs.

On May 23, 1995, Customs published a notice of proposed regulations to implement these principles. In that notice, Customs noted that the "as appropriate" phrase in section 334(b)(2)(A) had caused some confusion. Customs had received comments suggesting that if a Special Rule product is not a fabric, it would not be "appropriate" to determine its origin by referring to (b)(1)(C), as the Special Rule requires, because (b)(1)(C) on its face covers only fabric. Customs rejected this interpretation because it would render the (b)(2) Special Rule a nullity, since *none* of the Special Rule products were fabrics. Rather, these products had all "been advanced beyond the form of . . . yarn, thread, etc., or fabric."[3]

Customs maintained this interpretation in the face of further challenges, and in its final regulations, published on September 5, 1995, it enumerated specific requirements for determining the origin of the Special Rule goods. One of these requirements ordered that "[t]he country of origin of a good classifiable under the headings 6301 through 6306 is the country . . . in which the fabric comprising the good was formed by a fabric-making process."[4]

It was this order that gave rise to the complaint of Pac Fung Feather Co., Ltd. (Pac Fung) that Customs' regulations were "arbitrary, capricious, and otherwise not in accordance with law."[5] Pac Fung is a Hong Kong company that manufactures home textile articles, e.g. bedsheets, pillowcases, duvet covers, all of which are Special Rule products. Pac Fung manufactures these items in Hong Kong, Macau, and the People's Republic of China; however, the fabric used to manufacture the items is woven primarily in China. Thus, under Customs' new rule, all of Pac Fung's products manufactured in Hong Kong and Macau would be deemed to originate not in those areas, but in China. This in turn meant that Pac Fung's exports of the items would be subject to the quantitative restrictions imposed by the United States on textile exports from China.

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3. *Pac Fung*, 1995 WL 767350 at *2.

4. *Id.* This regulation covered the following Special Rule goods: blankets; traveling rugs; bed, table, toilet and kitchen linens; curtains and interior blinds; curtain valances; sacks and bags used for packing goods; tarpaulins, awnings, and sunblinds; tents; sails; and other furnishing articles. *Id.* at *8, n.1.

5. *Id.* at *3.

Customs had moved to dismiss on jurisdictional grounds, arguing that Pac Fung had failed to follow the procedures required by 28 U.S.C. § 1581(i). Customs had also challenged Pac Fung's standing on the grounds that Pac Fung had not demonstrated any actual or imminent injury. The Court denied both motions and then moved on to the merits. Pac Fung argued that the words "as appropriate" in Special Rule (b)(2) meant that the origin of a Special Rule product should be determined by using (b)(1)(A), (b)(1)(B) or (b)(1)(C) *only* if the product fit within the literal terms of those provisions (i.e. if the product was "wholly obtained/produced" or was "yarn, thread, etc." or was "fabric.") If the Special Rule product did not fit within those literal terms, then its country of origin should be determined by resorting to (b)(3), the Multicountry Rule.

The Court disagreed, saying that Pac Fung's interpretation violated the general principle that a statute should not be interpreted in a manner that renders other parts of the same statute inoperative. The Court reasoned that if a Special Rule product has to fit literally within the (b)(1)(B) or (b)(1)(C) terms, as Pac Fung insisted, then that product's origin could be determined by simply resorting to (B) or (C) in the first place, thus eliminating any need for the Special Rule provisions and rendering them superfluous. (This was essentially the same rationale that Customs had offered in its notice of proposed regulations of May 23, 1995.)

Pac Fung argued that it was Customs' interpretation that caused an irrelevance problem, because if a "Special Rule" product's origin is determined by the origin of the yarns or fabrics that comprise the product, then virtually none of the Special Rule products would ever be considered under the 334(b)(3) Multicountry Rule, thus rendering that provision superfluous. Customs countered that in fact the Multicountry Rule would be applied, for instance, when a Special Rule product is made from several fabrics that originate in different countries. The Court rejected Pac Fung's attack and accepted Customs' construction of the Multicountry Rule. The Court went on to hold that the only reasonable construction of the statute is that it requires the origin of Special Rule products to be determined by (b)(1)(A), (b)(1)(B), or (b)(1)(C), whichever is *most* appropriate to that product. *Significance:* The country of origin of a great variety of common furnishing-related textile articles will now be determined not by the country in which those articles were manufactured, but by the country in which the fabric comprising those articles was manufactured.

A REDUCTION IN DUTIABLE VALUE FOR MERCHANDISE CONTAINING LATENT DEFECTS CAN BE AUTHORIZED ONLY WHEN THE MERCHAN-

DISE IS OF LESSER QUALITY THAN THAT FOR WHICH THE IMPORTER CONTRACTED; ALSO, POST-IMPORTATION MAINTENANCE COSTS MUST BE SEPARATELY IDENTIFIED TO CUSTOMS PRIOR TO IMPORTATION IN ORDER TO DEDUCT THEM FROM THE ITEM'S DUTIABLE VALUE. *Samsung Electronics America, Inc. v. United States*, No. 91-04-00288, 1995 WL 631789 (Ct. Int'l Trade 1995).

This matter came before the Court of International Trade on the parties' cross motions for summary judgment concerning plaintiff's challenge to the appraisal by the United States Customs Service (Customs) of the value of certain imported articles. *Held: Denied*, plaintiff's motion for summary judgment; *Granted*, defendant's motion for summary judgment.

Samsung Electronics Co., Ltd. (Samsung Korea) sold various electronic products to Samsung Electronics America, Inc. (Samsung America) for importation into the United States. As part of the sales contracts, Samsung Korea and Samsung America entered into Servicing Agent Agreements (Agreements). Pursuant to the Agreements, Samsung Korea agreed to reimburse Samsung America for any inspections, repairs, or refurbishings performed by Samsung America on the imported products. From 1987 to 1990, Samsung America claimed that approximately 4.7 per cent of the products contained latent manufacturing defects that were detected after importation. Samsung America either sold those articles "as is" at a discount or repaired them. Then, in accordance with the Agreements, Samsung Korea reimbursed Samsung America for the costs of the profit losses and repairs on those items.

Customs assessed duties on all the electronic articles based upon their transactional value; that is, by using the price Samsung America actually paid when it purchased the items from Samsung Korea. Samsung America contended that Customs should have reduced the value of those goods that were defective prior to assessing duties, and offered two arguments in support.

Samsung America first argued that 19 C.F.R. § 158.12 (1990) authorizes a reduction in value for items that contain latent defects when they enter the United States. Customs in response argued that this regulation applies only when an importer receives merchandise that is of lesser quality than that for which it contracted. The court noted that since Customs' interpretation of its own regulation in this case was reasonable, such interpretation was entitled to judicial deference. Having thus accepted Customs' interpretation, the court then went on to apply that interpretation to this dispute. The court pointed out that Samsung America had not contracted to import only defect-free arti-

cles: Samsung America had acknowledged in the Agreements that some of the articles would contain defects that would require repair by Samsung America, at Samsung Korea's expense. In the court's words, Samsung America had contracted to receive both "(1) defect-free merchandise; and (2) defective merchandise for which it had a contractual right to compensation for loss or repair."[1] Thus, the court concluded that in receiving the defective goods, Samsung America received nothing less than that for which it had contracted, and that therefore 19 C.F.R. § 158.12 did not entitle Samsung America to a reduced valuation of the articles.

Samsung America next turned to 19 U.S.C. § 1401a(b)(3)(A)(i) and argued that the statute authorizes Customs to deduct from the transaction value of an article the cost of its post-importation maintenance.[2] The court decided that the statute applied only in those situations in which the importer, as part of the sales contract, has incurred post-importation maintenance costs in advance and has separated those maintenance costs from the price of the item. This separate identification allows Customs, when the item is imported, to exclude the pre-paid maintenance costs from its valuation of the item. Here, Samsung America did not incur (and thus did not identify) the post-importation maintenance costs when it bought the items; rather, Samsung America admitted that it did not incur the repair costs until after the items had been imported. The court therefore held that the statute's provisions were inapplicable to Samsung America in this case. *Significance:* A reduction in dutiable value for merchandise containing latent defects can be authorized only when the defective merchandise is of lesser quality than that for which the importer contracted; also, post-importation maintenance costs on imported items must be separately identified to Customs prior to importation; otherwise, such costs will not be deducted from Customs' duty assessment of the imported item.

WATER RESOURCES DEVELOPMENT ACT'S HARBOR MAINTENANCE TAX REPRESENTS A TAX AS APPLIED TO EXPORTS THAT IS PROHIBITED BY THE EXPORT CLAUSE. *United States Shoe Corp. v. United States*, 907 F.Supp. 408 (Ct. Int'l Trade 1995).

United States Shoe Corporation paid a tax, as mandated by the

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1. *Id.* at *2.

2. Samsung America contended that its costs to repair the latent defects constituted such maintenance; Customs disagreed. The court did not reach this issue, deciding that, in any event, the statute did not apply to Samsung America's situation. *Id.* at *3, and n.1.

Water Resources Development Act of 1986, on articles it exported from April through June, 1994. The tax imposed an ad valorem tax on "any port use" of federally-maintained navigable waterways.[1] United States Shoe Co. brought suit against the United States for recovery of the tax monies paid, claiming imposition of the tax violated the Export Clause.[2] The United States argued that the Tax is a valid exercise of Congress's constitutional authority to regulate foreign and interstate commerce and did not implicate its taxing powers. The United States further argued that even though the Export Clause restrains those powers, it cannot circumscribe Congress's unlimited capacity to regulate commerce.

In the Court of International Trade, the Court *Held*: *Affirmed.* The Harbor Maintenance Tax as it applies to exports constitutes a tax prohibited by the Export Clause and does not come under Congress's Commerce Clause authority. The power to regulate commerce does not restrain the Export Clause. Although Congress can adopt methods it deems necessary to accomplish its goals pursuant to the regulation of commerce, this authority is limited by other provisions of the Constitution.[3] The Court further explained that even if it found the tax to be a fee imposed under the commerce power, the fee is still subject to the restrictions of the Export Clause if it actually represents a tax or duty. Even if there was a charge upon exports imposed under the Commerce Clause as a user fee, or to regulate commerce, it would not be immune from the restrictions of the Export Clause if the court found the fee to be a tax or duty on exports. The Court's primary concern is what the fee actually represents, not what it is termed. *Significance*: This decision reaffirms the notion that the Congress's use of the Commerce Clause is not unlimited to the point where it offends other aspects of the Constitution. Further, the Court will view a tax on exports by any other name as a tax, prohibited by the Export Clause.

VIRGINIA'S CHOICE OF LAW REQUIRES THAT THE LAW OF THE PLACE OF PERFORMANCE OF THE CONTRACT BE APPLIED TO RESOLVE A

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1. 26 U.S.C.§§ 4461, 4462(a)(1) and (2). The statute defines "port use" as "the loading [and] unloading of commercial cargo [on or] from[ ] a commercial vessel at a port. A port is defined as any channel or harbor open to public navigation that is not an inland waterway.

2. U.S. CONST. art. I, § 9, cl. 5. The Export Clause provides "[n]o Tax or Duty shall be laid on Articles exported from any State."

3. United States v. Lopez, ___ U.S. ___, 115 S.Ct. 1624, 1627, 131 L.Ed.2d 626 (1995) (The commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution" (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824)).

BREACH OF CONTRACT DISPUTE. *Ali v. Al-Faisal*, 73 F.3d 356, 1995 WL 761102 (4th Cir. 1995).

Prince Khaled Bin Fahd Al-Faisal (Al-Faisal), a Saudi Arabian citizen, was granted summary judgment in a breach of contract claim and Ifan Ali, a United States citizen, appeals. Ali asserted that Al-Faisal had agreed to finance the opening of a McDonalds franchise in Saudi Arabia if Ali did the administrative work. According to Ali, the profits were to be shared equally. Al-Faisal moved for summary judgment on many grounds including that the contract was illegal in Saudi Arabia.[1]

In the United States Court of Appeals, Fourth Circuit, the Court *Held: Affirmed.* In granting summary judgment, the court views the non-moving party in the most favorable light. In this case, the Court assumed there was a valid contract, and looked to Virginia's choice of law principles[2] to see whether Virginia or Saudi Arabian law should apply to this contract dispute. Virginia's choice of law requires that the law of the place of performance of the contract be applied to resolve a breach of contract dispute. Since the place of performance is Saudi Arabia, Saudi Arabian law applies. Saudi Arabian law makes it illegal for a non-Saudi Arabian to own any part of a Saudi Arabian business[3] so the contract at its inception is illegal and therefore there can be no breach. *Significance:* Without any provision to the contrary, a breach of contract dispute in Virginia will be settled by applying the law of the place of performance.

LAW OF THE FORUM DETERMINES MATTERS RELATING TO SERVICE OF PROCESS ON FOREIGN CORPORATIONS. *Holman v. Warwick Furnace Company,* 456 S.E.2d 894 (S.C. 1995).

On April 15, 1985, plaintiffs were injured in an explosion in Gaston, South Carolina. Pursuant to S.C. Code Ann. § 15-9-245, they initiated suit against MAERZ Ofenbau AG, a Swiss corporation, on April 2, 1991 by delivering copies of their Summons and Complaint

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1. Al-Faisal also moved for summary judgment on the grounds that the contract was speculative, void for vagueness, and in violation of the Statute of Frauds. Since the Court found the contract to be illegal, there was no need to address these issues.

2. Since this is a diversity suit filed in federal court, the court must look to the choice of law of the forum. Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (cited in Ali v. Al-Faisal, 73 F.3d 356, 1995 WL 761102 at *3 (4th Cir. 1995)).

3. BUSINESS LAWS OF SAUDI ARABIA (Nicole Karam ed., 1994) (cited in Ali v. Al-Faisal, 73 F.3d 356, 1995 WL 761102 at *4 (4th Cir. 1995)).

(S&C) to the Secretary of State for South Carolina.[1] In turn, the Secretary of State mailed the S&C to MAERZ on April 8, 1991. MAERZ received the S&C on April 16, 1991. The statute of limitations on their claims expired on April 15, 1991. The first question presented to the court was whether service was effective upon a) delivery of the summons and complaint to the Secretary of State; or b) receipt by MAERZ.

Additionally, in accord with Swiss law, plaintiffs initiated service pursuant to letters rogatory on March 29, 1991 which MAERZ received on April 16, 1991. Accordingly, a second issue was whether service was in compliance with Swiss law.[2] The last issue was whether service made in compliance with South Carolina law was sufficient. On certified questions presented from federal district court, The Supreme Court of South Carolina *Held*: *Questions Answered.* (1) Service of process on foreign corporation not registered to conduct business in state was effective upon delivery of the S&C to the Secretary of State under §15-9-245; (2) service upon foreign corporation was in compliance with Swiss law; and (3) process made in compliance with South Carolina law would not have deprived South Carolina courts of jurisdiction even if service of process failed to comply with Swiss law. When construing statutes similar to the one at issue, The Supreme Court of South Carolina has held that service of process is effected when the designated agent is served.[3] Similarly, the United States District Court for the District of South Carolina has held service under §15-9-245 to be effective upon the delivery of suit papers to the Secretary of State."[4] This conforms with the general rule that service upon a designated agent is permissible, and personal service upon the defendant is unnecessary. In its discussion of the second and third questions presented, the court

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1. S.C. Code Ann. § 15-9-245 states in part:

a) Every foreign corporation which is not authorized to do business in this State. . .is considered to have designated the Secretary of State as its agent upon whom process may be served in any action or proceeding arising in any court in this state. . .

(b) Service of the process is made by delivering to and leaving with the Secretary of State. . .duplicate copies of the process. . . .The Secretary of State immediately shall cause one of the copies to be forwarded by certified mail, addressed to the corporation. . .

2. The Swiss law is based upon the position that any act touching Switzerland, including mailing of service into Switzerland from the U.S. is viewed by Switzerland as a judicial act by the United States, thereby invading Swiss Sovereignty.

3. See *Ballenger Electrical Contractors, Inc. v. Reach-All Sales, Inc.*, 276 S.C. 394, 279 S.E.2d 127, 128 (1981).

4. See *Hammond v. Honda Motor Co., Ltd.*, 128 F.R.D. 638 (D.S.C. 1989).

urged that the only relevant question is the sufficiency of process under United States laws. The court stressed that the law of the forum regulates matters relating to process, as well as its nature and effect. Moreover, the court reasoned that complete frustration results from a foreign country's objection to American methods of service and the resulting refusal to enforce American judgement and not from failure to effect personal service. *Significance*: As per the forum's law, service of process upon a foreign corporation is effective upon the delivery of the S&C to the statutorily designated Secretary of State.

VI. ZONING

INTERNATIONAL HEALTH ORGANIZATION IS NOT EXEMPT FROM COUNTY ZONING REGULATIONS PROHIBITING PRIVATE BUSINESSES IN RESIDENTIAL AREAS WHICH THE COUNTY WAS AUTHORIZED TO ENACT. *Pan American Health Organization v. Montgomery County*, 338 Md. 214 (1995).

The United States Court of Appeals for the Fourth Circuit sent the following certified question to the Maryland Court of Appeals:

> Whether the County Council for Montgomery County, sitting as the District Council, had the authority under state law to enact zoning legislation that had the effect of prohibiting the Pan American Health Organization ("PAHO") from locating its headquarters in a residentially-zoned area in Montgomery County.

The Plaintiff, PAHO, is an international health organization. PAHO wanted to re-locate its national headquarters from Washington, D.C., to residentially zoned property in Chevy Chase, Maryland. PAHO believed it could relocate to this area, despite the residential zoning status, because it qualified as a "public" organization that could be exempt from zoning regulations. The Defendants, Montgomery County, Maryland, and the County Council for Mongtomery County, Maryland, did not believe that PAHO was exempt from the zoning requirements. The Fourth Circuit case ensued from this dispute.

On certified question to the Maryland Court of Appeals, *Held: Certified question answered in the affirmative.* Local governments are authorized to promulgate zoning regulations which prevent businesses from locating in residential areas. International organizations are not necessarily exempt from such zoning regulations.

Regarding the certified question, PAHO first argued that Mont-

gomery County does not have the power to regulate public international organizations because these organizations are not specifically mentioned in the Regional District Act. The Court of Appeals disagreed. The Court ruled that the Regional District Act, codified in Article 28, §8-101 of the Maryland Code, expressly delegates the State's zoning powers to the counties. This Act does not mention *any* specific organization — if public international organizations are exempt because they are not mentioned in the Act, then every organization would be exempt. The PAHO attempted to counter this argument by asserting that it was a State governmental organization. PAHO argued that the State is not subject to its own enactments unless there is proof of clear intent to be bound by them. Though this common law principle is true, the Court did not agree that the principle applied in this case as PAHO is in no way part of or derived from the government of the State of Maryland.

Secondly, PAHO argued that its organization is "public" and is therefore exempt from county zoning regulations. Again, the Court disagreed, holding that PAHO is not public, despite its designation as a "public international organization" under the International Organizations Immunities Act (IOIA). The Court held that the IOIA definition does not apply to zoning regulations, and that PAHO is not public because it is not a governmental board, body or official, which are the only entities given the "public" label under Article 28, § 7-112. In sum, the Court found that neither of PAHO's arguments were sufficient to answer the certified question in its favor. The Court ruled that the County Council for Montgomery County did have the authority under Maryland law to enact zoning legislation that prohibited PAHO from locating its headquarters in a residentially zoned area in Montgomery County. *Significance:* International organizations are not necessarily exempt from local zoning laws and do not have the authority to bypass these laws when locating their places of business.