NOTES

AN EXERCISE IN JUDICIAL RESTRAINT: LIMITING THE EXTRATERRITORIAL APPLICATION OF THE SHERMAN ACT UNDER THE ACT OF STATE DOCTRINE AND SOVEREIGN IMMUNITY

I. INTRODUCTION

When a legal dispute involving a foreign nation is submitted to a United States court, the adjudication of rights and liabilities may prove problematic. Two formidable barriers, the act of state doctrine[1] and sovereign immunity,[2] limit the court's ability to resolve disputes which question the legality of sovereign acts. The circumstances under which a United States court should exercise its jurisdiction to consider the merits of a claim involving the application of domestic law to the acts of a foreign sovereign remains a controversial issue.[3]

The recent decision by the United States Court of Appeals for the Ninth Circuit in *International Assoc. of Machinists and Aerospace Workers* (IAM) *v. Organization of Petroleum Exporting Countries* (OPEC)[4] rekindled the controversy concerning judicial restraint in cases which question the validity of a foreign nation's acts of state. In refusing to adjudicate the merits of the case, the District Court relied on the provisions of the Foreign Sovereign Immunities Act (FSIA).[5] On appeal, the Court of Ap-

---

1. The act of state doctrine is defined as a self-imposed rule of judicial abstention under which a United States court is precluded from inquiring into the validity of a foreign act of state. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). See *infra* discussion section III.

2. Sovereign immunity is a principle of international law which requires that domestic courts refrain from asserting jurisdiction over a foreign sovereign. W. BISHOP, INTERNATIONAL LAW 550 (1962). See *infra* discussion section IV.

3. Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247 (1977). Cooper, *Act of State and Sovereign Immunity: A Further Inquiry*, 11 LOY. U. CHI. L. REV. 193 (1980).

4. 649 F.2d 1354 (9th Cir. 1981).

5. On the question of jurisdiction, the District Court concluded: "[i]n view of all the evidence presented, this court finds that the activity carried on by the defendant OPEC member nations is *not* 'commercial activity;' that, therefore, defendants are entitled to immunity under 28 U.S.C. § 1604 (Foreign Sovereign Immunities Act)." 477 F. Supp. 553, 569. See *infra* section VI.

peals exercised similar deference, but on an alternative theory—the act of state doctrine.[6] The *OPEC* case focuses renewed attention on the doctrinal bases underlying the act of state doctrine and sovereign immunity. Consequently, the decision's impact on the scope of judicial restraint deserves inquiry.

This Note will focus on the reasoning applied by the Court of Appeals in granting OPEC immunity under the act of state doctrine. After introducing the factual circumstances giving rise to IAM's claim, the Note will trace the development and application of both the act of state doctrine and the Foreign Sovereign Immunities Act.[7] Finally, this Note will undertake a critical analysis and evaluation of the rationale applied by each court in disposing of the antitrust claim against the OPEC nations.

II. BACKGROUND OF THE CASE

The defendant, OPEC,[8] currently composed of thirteen petroleum producing and exporting nations,[9] was first organized in 1960.[10] At that time, petroleum producing countries lacked the ability to coordinate oil production.[11] Foreign oil companies held exclusive authority over the output, production and pricing of oil.[12] During the fifties, the oil companies, faced with mounting oil reserves and increasing demand, engaged in competitive pricing.[13]

---

6. 649 F.2d at 1362. See *infra* discussion section VII.

7. Although the focus of this Note is on the act of state doctrine, an understanding of sovereign immunity is necessary to appreciate the problems faced in cases involving the acts of foreign sovereigns and extraterritorial jurisdiction.

8. The plaintiff, IAM, sued both OPEC, the organization, and its thirteen member nations individually, for alleged price-fixing activities. The failure to properly serve OPEC, the organization, however, resulted in its dismissal as a defendant. Thus, the trial was directed at the remaining complaint, a suit for injunctive relief against the thirteen individual OPEC nations. 477 F. Supp. at 553.

9. OPEC is comprised of the following members: Iran, Iraq, Kuwait, Saudi Arabia, Venezuela, Ecuador, Algeria, Gabon, Indonesia, Libya, Nigeria, Qatar, and the United Arab Emirates. *See* R. STONE, OPEC AND THE MIDDLE EAST: THE IMPACT OF OIL ON SOCIETAL DEVELOPMENT 1 (1977).

10. S. MANOHARAN, THE OIL CRISIS: END OF AN ERA 55 (1974).

11. The oil resources of the Middle East were, until the late 1950s, almost wholly developed under exclusive concessions granted before World War II to companies controlled by eight foreign parent companies. The concessions covered most or all of the territories of the countries and ran for long periods, usually between 60 and 75 years. S. SCHURR & P. HOMAN, MIDDLE EASTERN OIL AND THE WESTERN WORLD 13 (1971).

12. Note, *From Concession to Participation: Restructuring the Middle East Oil Industry*, 48 N.Y.U. L. REV. 774, 779 (1973).

13. *Id. See* Jensen, *International Oil—Shortage, Cartel or Emerging Resource Monopoly*, 7 VAND. J. TRANSNAT'L L. 335 (1974).

In 1960, downward pressure on market demand forced the oil companies to cut their prices, resulting in substantial losses to host-government revenues.[14] To meet this threat to revenues, the host-governments formed the Organization of Petroleum Exporting Countries (OPEC) in an effort to coordinate and stabilize the price of crude oil[15] "free from all unnecessary fluctuations."[16] To achieve this goal, the member states established a system of voluntary production limits and royalties.[17] Currently, OPEC's oil is produced and exported through government-owned companies or through government participation in private companies.[18]

The plaintiff, IAM, is a non-profit labor association whose members work in petroleum-consuming industries.[19] IAM, disturbed by the high price of oil and petroleum products,[20] alleged that the increased oil prices resulted from OPEC's price-setting activities.[21] Accordingly, IAM sued OPEC under section I of the Sherman Act[22] for illegal price-fixing.[23] Price-fixing, an arrangement

---

14. After World War II, host governments were given a greater share of corporate profits through fixed royalty payments, amounting to 50 percent of the concessionaires' profits. "With the governments' revenues tied to profit, total revenues now depended on the concessionaires' decision on pricing." *See* Note, *supra* note 12, at 778. "The oil companies unilaterally reduced the oil prices first in 1959 . . . , leading to a sharp decline in the government per barrel revenue. Per barrel revenue declined from 84.6 cents in 1958 to 75.6 cents in 1961." S. MANOHARAN, *supra* note 10, at 50.

15. This goal was stated as: "[T]he unification of petroleum policies for Member Countries and the determining of the best means for safeguarding the interests of Member Countries individually and collectively." *Resolutions Adopted at the Conference of the Organization of Petroleum Exporting Countries*, Resolution 1.2(4).

16. *Id.*, Resolution 1.1.

17. *See* Zakariya, *New Directions in the Search for and Development of Petroleum Resources in Developing Countries*, 9 VAND. J. TRANSNAT'L L. 545 (1974).

18. *See* Note, *supra* note 12, at 793-814.

19. 649 F.2d at 1355. "[L]ike most Americans, they [IAM] are consumers of gasoline and other petroleum-derived products." *Id.*

20. Dramatic increases in oil prices began in the early 1970s. On October 16, 1973, the Persian Gulf producers met in Kuwait and unilaterally raised posted oil prices by 70 percent. On January 1, 1974, OPEC raised posted prices further by 130 percent. G. CHANDLER, OIL—PRICES AND PROFITS 15, table 2 (1975). "Within two years, the price of crude oil had quadrupled." *Id.*

21. 477 F. Supp. 553 (C.D. Cal. 1979). *See* First Amended Complaint for Injunctive Relief and Damages for Sherman Act Violations. *Id.* at 569.

22. 15 U.S.C. § 1 (1976). This section provides in part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."

23. 477 F. Supp. at 558. Horizontal price-fixing violates §§ 1 and 3 of the Sherman Act which proscribes concerted action in restraint of trade, and § 5 of the FTC Act which prohibits unfair methods of competition in or affecting price-fixing. J. VON KALINOWSKI, 16A BUSINESS ORGANIZATION: ANTI-TRUST LAWS AND TRADE REGULATION 6A-1 (1981). *See*

between two or more competitors aimed at controlling market prices, is conclusively presumed by the courts to be illegal per se.[24] Claiming injury from high oil prices,[25] IAM sought injunctive relief and damages.[26]

The defendants, OPEC and the thirteen individual nations, refused to recognize the court's jurisdiction and failed to appear in the proceedings.[27] Various amici curiae argued OPEC's case,[28] which was subsequently limited to the suit for injunctive relief against the thirteen OPEC member nations.[29] The District Court granted judgment in favor of the defendants based on the FSIA.[30] On appeal, the Court of Appeals for the Ninth Circuit affirmed the District Court's decision to dismiss the suit against the defendants, but this time under the act of state doctrine.[31]

III. THE ACT OF STATE DOCTRINE

The act of state doctrine represents a policy of judicial

United States v. Trenton Potteries Co., 273 U.S. 392 (1926); Keifer Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

24. Price-fixing is deemed so anticompetitive and contrary to public policy "that it is conclusively presumed to be illegal under the antitrust laws without further inquiry." VON KALINOWSKI, *supra* note 23. The seminal case applying the per se approach to condemn price-fixing is *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

In 1940, the Court reaffirmed and expanded the per se approach of *Trans-Missouri* in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In *Socony*, the Court declared that "[u]nder the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity . . . is illegal per se." *Id.* at 221.

25. See *supra* note 21.

26. 477 F. Supp. at 560. The plaintiffs asked for damages under § 4 of the Clayton Act, and injunctive relief under § 16 of the Clayton Act. 15 U.S.C. §§ 4, 16 (1973).

27. 477 F. Supp. at 575. The District Court's inability to automatically enter a default judgment against the non-appearing defendants compounded the plaintiff's claim. Under the Foreign Sovereign Immunities Act § 1608(e), the court cannot enter a default judgment automatically upon failure or refusal of a foreign sovereign to appear after being served. *See* 28 U.S.C. § 1608(e) (1976).

28. 477 F. Supp. at 567. The counsel for amicus curiae were the Indonesia-U.S. Business Committee for the Indonesian Chamber of Commerce and the Concerned Black Americans in Support of Africa and the Middle East. For the arguments raised by counsel, see *infra* notes 132-133 and accompanying text.

29. Early in the proceedings, the District Court dismissed the plaintiff's claim for damages. "Since the plaintiff did not allege or show that it purchased any crude oil or gasoline from the defendants, . . . it necessarily had to be and was and is an 'indirect purchaser' of and from the defendants." 477 F. Supp. at 560-61. The Supreme Court held that a plaintiff in a price-fixing case may recover only if it purchased directly from the alleged price-fixer. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

30. 477 F. Supp. at 575-76. See *infra* discussion section VI(B).

31. 649 F.2d at 1361-62. See *infra* discussion section VII.

abstention from examining the propriety of acts taken by foreign governments within their sovereign territory.[32] The doctrine's underlying rationale rests upon both the respect afforded to independent sovereign states[33] and the allocation of functions among the branches of government under the "separation of powers" principle.[34] The deferential nature of the doctrine, however, does not deprive a court of its jurisdiction to hear the dispute.[35] Nor does its application evince the court's acceptance of the foreign sovereign's authority over the disputed acts.[36] Rather, the doctrine simply removes certain sensitive issues from judicial consideration,[37] in deference to the executive's control over foreign policy.[38]

A. Origins and Development

The traditional formulation of the doctrine by an American court is found in *Underhill v. Hernandez*,[39] where Chief Justice Fuller said for a unanimous Court:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[40]

---

32. Underhill v. Hernandez, 168 U.S. 250 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

33. "Bringing a state without its consent before a foreign court and, especially, applying coercive measures . . . will always amount to a direct violation of its sovereignty." M. BOGUSLAVSKIJ, STAATLICHE IMMUNITAT 40-44 (Rathfelder trans. 1965), translated into English in W. FRIEDMANN, O. LISSITZYN, R. PUGH, INTERNATIONAL LAW: CASES AND MATERIAL 663-664 (1969).

34. 376 U.S. 398 (1964).

35. *Id.* at 420.

36. *Id.* at 421. The forum state, in applying the act of state doctrine, "merely declines to adjudicate or make applicable its own law to parties or property before it." *Id.*

37. The Supreme Court explained in *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1917):

> The rule . . . does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when . . . the foreign government has acted in a given way. . . , the details of such action cannot be questioned but must be accepted by our courts. . . . To accept a ruling authority . . . is not a surrender of jurisdiction but is an exercise of it.

38. *Id.* at 423. This adherence to "separation of powers . . . concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Id.*

39. 168 U.S. 250 (1897).

40. *Id.* at 252.

With sovereignty as a guiding principle, the Court was provided with a sound basis for refusing to consider the validity of the actions challenged in this case. Although *Underhill* involved the actions of a military commander representing a de facto government,[41] the principle of immunity developed by the Court remained applicable. The Supreme Court concluded that the acts of a de facto government, subsequently recognized by the United States, would be given presumptive validity by American courts.[42]

Subsequently, two notable cases with facts similar to those in *Underhill*, *Oetjen v. Central Leather Co.*[43] and *Ricaud v. American Metal Co.*,[44] reaffirmed the *Underhill* doctrine in unequivocal terms.[45] Relying on the precedent established in the *Underhill*, *Ricaud*, and *Oetjen* cases, the courts in subsequent cases applied the doctrine under varying circumstances.[46] From these cases developed the basic elements needed to support the act of state doctrine, which include: 1) public acts of sovereignty;[47] 2) under-

---

41. The defendant, General Hernandez, commanded the Venezuelan revolutionary army which overthrew the existing government. Underhill, the plaintiff, a United States citizen living in Venezuela, was denied an exit passport by Hernandez. This action was brought by Underhill for unlawful confinement and assault. Before the claim was adjudicated, however, the United States recognized the revolutionary forces as the legitimate government of Venezuela. *Id.*

42. *Id.* at 254. The Court explained: "The immunity of individuals from suits brought in foreign tribunals . . . in the exercise of government authority, whether as civil officers or as military commanders, must necessarily extend to the agents of government, ruling by paramount force. . . ." *Id.*

43. 246 U.S. 297 (1917). This case involved the seizing of hides from a Mexican citizen by General Villa, acting under the direction of General Carraza, whose regime was subsequently recognized by the United States. The plaintiff, assignee of the original owner, claimed the defendant received the hides in violation of the Hague Convention. The Court applied the *Underhill* rationale, to uphold the actions of the de facto government and deny plaintiff's claim. *Id.*

44. 246 U.S. 304 (1917). This case involved the seizing of lead bullion for General Carranza's forces. The expropriated property, however, belonged to a United States citizen. Again, relying on the *Underhill-Oetjen* rationale, the Court denied the plaintiff's claim and the actions were given presumptive validity.

45. 246 U.S. at 303 *citing* Underhill v. Hermandez, *see supra* note 39. *See also* 246 U.S. at 309.

46. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (expropriation of property); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (antitrust claim for seizure of plantation); Carl Zeiss Stiftung v. V.E.B. Zeiss, Jena, 293 F. Supp. 892 (S.D.N.Y. 1968) (confiscated trademark).

47. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965). This section provides in part: "[A] court in the United States, having jurisdiction . . . to determine a claim . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests." *Id.*

taken by a recognized foreign government exclusively within its own territory.[48]

B. Sabbatino and the "New Rationale"

In the 1964 decision in *Banco Nacional de Cuba v. Sabbatino*,[49] the United States Supreme Court formulated a modern rationale to support the foundations of the act of state doctrine. Rejecting the notion that the doctrine is compelled solely by the inherent nature of sovereignty,[50] the Court found that the doctrine also "arises out of the basic relationships between branches of government in a system of separation of powers."[51] Recognizing the possible adverse consequences of a court's passing upon the validity of foreign acts of state,[52] the Court held that the doctrine's "continuing vitality depends upon its capacity to reflect the proper distribution of functions between the judicial and political branches of the government on matters bearing upon foreign affairs."[53]

Under this rationale, the Court identified two factors to be considered in determining the doctrine's applicability to a particular situation.[54] These balancing factors include the degree of consensus concerning international legal principles controlling the dispute,[55] and the impact of a judicial resolution on an issue of foreign policy.[56] Thus, the Court avoided "laying down or reaffirm-

---

48. *Id.* §§ 42-43.

49. 376 U.S. 398 (1964).

50. *Id.* at 421, *citing* Underhill v. Hernandez, 168 U.S. 250, *and* American Banana Co. v. United Fruit Co., 213 U.S. 347. The Court went on to state that "[w]hile historic notions of sovereign authority to bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence." *Id.*

51. *Id.* at 423. See *supra* note 38.

52. *Id.* at 431. The Court explained that "[p]iecemeal dispositions involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached." *Id.* at 431-32.

53. *Id.* at 427-28.

54. *Id.* at 428.

55. *Id.* The Court noted: "It should be apparent that the greater the degree of codification . . . concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . ." *Id.*

56. *Id.* at 432.

If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violations of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests. *Id.*

ing an inflexible and all encompassing rule."[57] Applying these factors to the dispute at hand, the Court upheld the Cuban expropriation.[58]

Critics of *Sabbatino*, however, were opposed to the Court's application of the act of state doctrine.[59] Congress subsequently enacted the "Hickenlooper Amendment"[60] in an effort to limit the scope of the doctrine in future cases.[61] The effect of the amendment was to achieve a "reversal of presumptions."[62] The amendment now required the courts to consider the merits of cases involving foreign confiscations violative of international law.[63]

IV. *RECENT DEVELOPMENTS IN THE ACT OF STATE DOCTRINE*

A. *Dunhill and the "Commercial Exception"*

Owing to recent developments in the expansion of commercial activities undertaken by foreign nations,[64] the United States embraced a "restrictive theory" of sovereign immunity.[65] Under this

---

57. *Id.* at 428. The Court went on to state: "[W]hether forebearance by an American court in a given situation is advisable or appropriate depends upon the balance of relevant considerations." *Id.* See *supra* notes 52, 55, 56.

58. 376 U.S. at 428.

59. Particularly opposed to the *Sabbatino* decision has been the State Department. "In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy." Letter from the State Department, Washington, Nov. 26, 1975, *reprinted in* Alfred Dunhill v. Republic of Cuba, 425 U.S. 682, 710 (1976). The legislative branch's discontent with *Sabbatino* was also expressed. See *infra* note 60 and accompanying text.

60. 22 U.S.C. § 2370(e)(2) (1970). The Amendment provides in part: "[N]o court in the United States shall decline on the grounds of the federal act of state doctrine to make a determination on the merits . . . in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . ." *Id.*

61. *See* [1964] U.S. CODE CONG. & AD. NEWS 3829, CONF. REP. NO. 1925, 88th Cong., 2d Sess.

62. *Id.* The Advisory Committee explained this reversal of presumptions.

> Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy. . . . Under the Amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.

Id.

63. See *supra* notes 60, 62.

64. *See* B. WESTON, R. FALK AND A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 809 (1980). *See also* T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 216-34 (1970).

65. See *infra* notes 104-05 and accompanying text.

theory, a foreign state's involvement in purely commercial activities would not enjoy the immunity previously extended under prevailing judicial principles.[66] The Supreme Court attempted to reconcile the restrictive theory with the act of state doctrine in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[67]

In *Dunhill*, the Court refused to grant immunity under the act of state defense for Cuban nationalization of the business assets of five leading cigar manufacturers.[68] The Court recognized that the "concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owned by a foreign sovereign or by one of its commercial instrumentalities."[69] Cognizant of the principles underlying the restrictive theory, the Court concluded: "we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch."[70] In doing so, the Court announced a "commercial act" exception to the act of state defense.[71] Justice Stevens' failure to concur with this exception,[72] however, resulted in a plurality opinion.[73]

---

66. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (1965). This theory requires the court to grant immunity to claims arising from a foreign nation's public or governmental acts, but not those commercial in nature. See *infra* notes 102-04 and accompanying text.

67. 425 U.S. 682 (1976).

68. *Id.* This case involved former owners of Cuban cigar companies suing certain U.S. importers of cigars for trademark infringement and the purchase price of cigars sold by the manufacturers to the importers. The companies had been seized by the Castro government but continued to ship cigars to the importers. The former owners claimed that the shipments belonged to them and asserted their rights to recover the amounts paid for the cigars. The claimants also demanded recovery for amounts paid by the importers to the intervenors for shipments sold prior to the intervention. Each importer, except Alfred Dunhill of London, Inc., owed more to the intervenors than they had paid. Dunhill, however, had paid an additional $55,000 for pre-intervention shipments. *Id.*

69. *Id.* at 698. The Court reasoned that:

> [R]epudiation of a commercial debt cannot, consistent with this restrictive approach to sovereign immunity, be treated as an act of state; for if it were, foreign governments, by merely repudiating the debt before or after its adjudication, would enjoy an immunity which our Government would not extend them under prevailing sovereign immunity principles.

Id.

70. 425 U.S. at 697.

71. *Id.* at 706. "Acts committed by foreign sovereigns in the course of their purely commercial operations will no longer be considered acts of state." *Id.*

72. *Id.* at 715. (Stevens, J., concurring). This opinion states: "For reasons stated in Parts I and II of the Court's opinion, I agree that the act of state doctrine does not bar the entry of the judgment in favor of Dunhill." *Id.* (The "exception" was described in Part III).

73. *Id.*

Thus, the precedential value of the "commercial exception" to the act of state doctrine remains in question.[74]

B. Timberlane and the "Balancing Approach"

Recent applications of the act of state defense involved claims based on foreign antitrust violations under the Sherman Act.[75] The impact of extraterritorial application of the antitrust laws are a matter of concern for the judiciary,[76] as such "broad assertions of authority" may seriously intrude upon foreign states' interests.[77] Indeed, many affected nations have resented and protested such intrusion,[78] or simply refused to recognize the courts' exercise of jurisdiction.[79] Thus, the courts sought to establish modern methods which reflect the interests of both the United States and foreign states in antitrust litigation.[80]

Recognizing the foreign and domestic implications involving extraterritorial antitrust enforcement, the courts attempted to balance the competing interests involved in judicial intervention in *Timberlane Lumber Co. v. Bank of America.*[81] The Court in

---

74. H. BLACK, LAW OF JUDICIAL PRECEDENTS 10 (1912). Under the classical theory of precedent, the lack of a clear majority rationale in support of the judgment deprived the judgment of all precedential value, and the decision was authority for the result only. *Id.* The Second Circuit, however, has applied the *Dunhill* exception as authority. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1977). *See also* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756 (1980).

75. The act of state doctrine was first applied in an antitrust case in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). *See*, Bloch, *Extraterritorial Jurisdiction of U.S. Courts in Sherman Act Cases*, 54 A.B.A.J. 781, 782 (1968). *See, e.g.*, Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962).

76. See *supra* text accompanying notes 56-61.

77. *See* A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 365-72 (2d ed. 1970); Zwarensteyn, *The Foreign Reach of American Antitrust Laws*, 3 AM. BUS. L.J. 163, 165-69 (1965).

78. *See* A. NEALE, *supra* note 77.

79. A classic example occurred in the OPEC case herein, 477 F. Supp. 553. See *supra* note 9.

80. The need for a "balancing of interests" was noted by Michael J. Egan, Associate Attorney General, Justice Department, in an address given on November 3, 1977, *reprinted in* VON KALINOWSKI, *supra* note 23 at 5.04(1), n.7. He identified two "fundamental sources of tension" that result from antitrust enforcement:

> 1) United States law and policy seek to prevent anticompetitive behavior in situations in which some foreign laws and policies permit and even require it;
>
> 2) Some foreign governments question the appropriateness of our application of United States law to persons residing and acts taking place within their territory. *Id.*

81. 549 F.2d 597 (5th Cir. 1976). The plaintiffs, Timberlane Corp., alleged that officials

Timberlane overruled the District Court's dismissal of the alleged conspiracy[82] and announced the elements to be weighed in determining whether United States interests support the exercise of jurisdiction.[83] According to the Court, the requisite elements include:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[84]

When a court determines that the balance tips in favor of United States interests, the act of state doctrine is inappropriate to preclude the extraterritorial application of the antitrust laws.[85] Conversely, when the balancing test demonstrates that judicial determination would involve an intemperate invasion into foreign policy,[86] or insult sovereign authority,[87] the act of state defense is properly upheld.[88]

---

of the Bank of America conspired to prevent the plaintiff from milling lumber in Honduras and exporting it to the United States. The Honduran lumber export business consequently remained under the control of individuals, financed and controlled by the Bank, in violation of §§ 1 and 2 of the Sherman Act. The District Court dismissed the action under the act of state doctrine. *Id.* at 600-01.

82. *Id.* at 615.

83. See *infra* text accompanying note 84.

84. *Id.* at 614. *See* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958).

85. 549 F.2d at 614-15. The *Timberlane* court applied these factors and concluded:

> [I]t is clear that most of the activity took place in Honduras, . . . and that the most direct economic effect was probably on Honduras. However, there has been no indication of any conflict with the law or policy of the Honduran government, nor any comprehensive analysis of the relative connections and interests of Honduras and the United States. Under these circumstances, the dismissal by the district court cannot be sustained. . . . *Id.*

86. See *supra* notes 52, 56.

87. 549 F.2d at 613.

88. *Id.*

V. SOVEREIGN IMMUNITY

Sovereign immunity is a principle of international law[89] under which domestic courts abstain from exercising jurisdiction over a foreign state.[90] The doctrine's underlying rationale is based on each nation's respect for the sovereignty of foreign states.[91] Under this doctrine, the principle of "independent equality between states"[92] is preserved by granting a foreign nation immunity from liability despite the domestic court's ability to establish jurisdiction.[93]

A. *Origins and Development*

Total immunity, characterized as the "absolute theory," prevents a foreign court from exercising jurisdiction over another sovereign regardless of the nature of the acts in question.[94] This theory was first adopted by the Supreme Court in *Schooner Exchange v. McFadden*.[95] In *Schooner*, the Court held that international law prohibits a domestic court from asserting jurisdiction over a foreign sovereign without that nation's consent.[96] Chief

---

89. The Christina [1938] A.C. 485, 502. Lord Wright stated that the principle of sovereign immunity is "sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law." *Id.* *See* 22 AM. J. INT'L L. 117, 127 (Spec. Supp. 1928) *reprinted in* T. GIUTTARI, *supra*, note 64 at 4.

90. T. GIUTTARI, *supra* note 89, at 5. Theoretically, the rationale for sovereign immunity developed from traditional concepts of nineteenth century international law. In that period, the state possessed absolute sovereignty, exclusive territorial jurisdiction, and legal equality among the nations. Possessing such attributes, each state could not be subjected to the jurisdiction of another state. *Id.* *See also* W. BISHOP, INTERNATIONAL LAW 531 (1971). *Compare* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 65 (1965).

91. W. BISHOP, *supra* note 90, at 500.

92. *See* The Antelope, 23 U.S. (10 Wheat) 66 (1825). *See also* I. L. OPPENHEIM, INTERNATIONAL LAW § 70 (5th ed. 1937).

93. RESTATEMENT OF FOREIGN RELATIONS LAW, § 66. Unlike the act of state defense, however, sovereign immunity may not be claimed by a private litigant; it is limited solely to a foreign government, its agents, or instrumentalities. *Id.*

94. T. GIUTTARI, *supra* note 90, at 9. Under the "absolute theory" of sovereign immunity a foreign government cannot be sued "[i]n the courts of other nations without its consent regardless of the activities involved." *Id.* During the eighteenth and nineteenth centuries, the granting of absolute immunity to all governments was generally accepted by most nations. WHEATON, INTERNATIONAL LAW, 168-69 (8th ed. 1866).

95. 11 U.S. (7 Cranch) 116 (1812).

96. *Id.* at 137. The Court stated:

> One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory in the confidence that the immunities belonging to his

Justice Marshall, speaking for a unanimous Court, stated: "This full absolute territorial jurisdiction being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects."[97] The *Schooner* approach to sovereign immunity was generally accepted by domestic courts until the mid-1900s.[98]

In the 1940s, the Supreme Court recognized that cases involving sovereign immunity directly affect our relations with the foreign government involved.[99] The Court reasoned that because the political branches of government are charged with the conduct of foreign affairs, controversies involving foreign nations are best handled "through diplomatic negotiations rather than by the compulsions of judicial proceedings."[100] As a result, the Court now gave conclusive effect to State Department suggestions on the disposition of cases involving claims of sovereign immunity.[101]

During this period, however, the nature and character of a sovereign changed dramatically. As foreign governments became increasingly involved in commercial activities and moved away from their traditional roles, a shift from absolute immunity took place. Most nations began to embrace a restrictive approach to sovereign immunity.[102] According to this restrictive theory, "the immunity of a sovereign is recognized with regard to sovereign or public acts of a state, but not with regard to private acts."[103]

In 1952, the State Department adopted the restrictive theory of sovereign immunity as official United States policy in the so-called "Tate Letter."[104] Its adoption was based in part on the ra-

---

independent sovereign station . . . are received by implication, and will be extended to him.

Id.

97. *Id.*

98. *See* Berrizzi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926); Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938).

99. Ex parte Republic of Peru, 318 U.S. 578 (1943); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

100. 324 U.S. at 35. The Court in *Hoffman* explained: "[i]n such cases the judicial department of this government . . . will not embarrass the latter by assuming an antagonistic jurisdiction." *Id.*

101. *Id.* at 35. The Court stated: "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.*

102. See *infra* note 112 and accompanying text.

103. See *infra* note 104, at 985.

104. Letter of May 19, 1952, from the State Department Acting Legal Advisor Jack B. Tate to Philip B. Perlman, Acting Attorney General, *reported in* 26 DEP'T STATE BULL. 984 (1952).

tionale "that the wide-spread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in court."[105] Difficulties were encountered, however, as no guidelines in determining immunity questions were developed by the State Department.[106] This problem was exacerbated by State Department inconsistencies —silence on immunity questions in certain politically uncomfortable cases and strict demands in politically favorable cases.[107] Although the theoretical basis of restrictive sovereign immunity was clearly established, apolitical application under recognized legal principles remained elusive.

The executive branch subsequently began to recognize it was "ill-suited" for the task of resolving sovereign immunity questions.[108] Indeed, in 1973, both the State Department and the Justice Department jointly introduced a bill seeking restrictions on their roles in cases involving the application of sovereign immunity.[109] The drawbacks associated with restrictive immunity under the guidance of the executive branch provided a motivating

---

105. *Id.* at 984-85. "[I]t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests for a grant of immunity." *Id.* The State Department's reasons for this policy change included: "1) the increased international acceptance of the restrictive theory, and the feeling that if the United States was allowing itself to be sued in other countries on that theory, its courts should have jurisdiction over foreign sovereigns; 2) the recognition that communist countries benefited from the absolute theory. . . ." *Id.*

106. *See* Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946); Note, *The Relationship Between Executive and Judiciary: The State Department as the Supreme Court of International Law*, 53 MINN. L. REV. 389 (1968); Lyons, *The Conclusiveness of the Suggestion and Certification of the American State Department*, 24 BRIT. Y.B. INT'L L. 116 (1947).

107. In those cases where the State Department remained silent, inconsistent conclusions resulted. *Compare*, Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974) (governmental purchase of military equipment given immunity based on the purpose of the commercial transaction) *with* Victory Transport, Inc. v. Comisaria General De Abastecimientos y Transports, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (applying the nature of the activity test in determining sovereign immunity claim by Spanish government after plaintiff sought arbitration for damage to ship). In politically sensitive cases, the State Department used suggestions of immunity for other objectives. *See* Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961) (exchange of a suggestion of immunity for the return of a hijacked airliner).

108. Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. of the Judiciary, 93rd Cong., 1st Sess. 14 (1973).

109. Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978).

force behind the passage of the Foreign Sovereign Immunities Act.[110]

B. The Foreign Sovereign Immunities Act

In 1976, Congress, in an effort to free the judiciary from dependence on the executive branch[111] and bring the United States into conformity with other nations,[112] enacted the Foreign Sovereign Immunities Act (FSIA).[113] Viewed broadly, the Act sought to establish four basic goals: 1) to codify the restrictive theory of immunity,[114] 2) to depoliticize immunity determinations by recommitting them to the judiciary,[115] 3) to establish a statutory procedure for obtaining in personam jurisdiction over foreign states,[116] and 4) to produce methods to ensure the execution of judgments.[117]

The legislative history of the Act indicates Congress' desire to remedy the drawbacks associated with executive interference in sovereign immunity cases.[118] The FSIA eliminated the State Department as the primary decisionmaking body and established a system for the judicial determination of sovereign immunity questions.[119] Under the Act, litigants are assured that immunity decisions are made by the courts under established legal principles in a politically neutral environment.[120]

---

110. See *infra* note 115.

111. 28 U.S.C. §§ 1602-11 (1976). *See* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. IN WORLD PUB. 126-27 (1976).

112. The legislative history of the FSIA recognized the practices of other nations. Under the Act, "U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity questions are made exclusively by the courts...." [1976] U.S. CODE CONG. & AD. NEWS, 6604, 6606.

113. 28 U.S.C. §§ 1602-1611 (1976).

114. [1976] U.S. CODE CONG. & AD. NEWS at 6604.

115. *Id.* at 6605.

116. *Id.* at 6606. "A motivating force behind the bill was . . . to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications and assuring litigants these often crucial decisions are made on purely legal ground and under procedures that insure due process." *Id.*

117. Section 2 of the bill adds a new section 1330 to Title 28 of the United States Code which provides for subject matter and personal jurisdiction of United States courts over foreign nations. *Id.* at 6611. The drafters expected that such a comprehensive jurisdictional scheme would "be conducive to uniformity in decision, which is desirable since a disparate treatment of cases . . . may have adverse foreign relations consequences." *Id.*

118. *Id.* at 6606. The State Department would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.

119. *Id.*

120. *Id.*

Judicial decisions concerning sovereign immunity are limited by the express terms of the Act.[121] The "commercial activity" exception is of particular importance.[122] The drafters of the statute did not apply precisely defined wording to the exception, indicating their desire to have it broadly applied.[123] Indeed, the House Report states: "As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant: it is the essentially commercial nature of an activity or transaction that is critical."[124] Under this exception, the courts are prohibited from exercising their discretion by inquiring into the intended use or purpose of the transactions.[125] Rather, the courts are directed to apply the restrictive "nature of the activity" test in determining a grant of immunity.[126] The drawbacks associated with applying this "test" were considered by the District Court in *IAM v. OPEC*.

VI. THE DISTRICT COURT DECISION IN IAM V. OPEC

After dismissing IAM's claim against OPEC, the

---

121. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1330(a), 90 Stat. 2890. The legislative history accompanying this section states that the act "set forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states. . . ." [1976] U.S. CODE CONG. & AD. NEWS at 6610. "It is intended to preempt any other State or Federal law . . . for according immunity to foreign sovereigns." *Id.*

122. 28 U.S.C. § 1603 (1976). This section defines commercial activity as either a "regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*

Section 1602 goes on to state that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned. . . ." 28 U.S.C. § 1602 (1976).

123. The drafters of the Act intended that "the courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." [1976] U.S. CODE CONG. & AD. NEWS at 6615.

124. *Id.* at 6605.

125. See *supra* note 122.

126. See *supra* note 122. The legislative history of the Act gave the following simplistic explanation:

> Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

[1976] U.S. CODE CONG. & AD. NEWS at 6615. Such a broad test affords immunity only when the nature of the act is capable of being performed solely by a state and not a person. Mehren, *supra* note 109, at 49. Similarly, an act done solely for profit would be characterized as commercial in nature. [1976] U.S. CODE CONG. & AD. NEWS at 6615.

organization,[127] and the damages claim,[128] the District Court considered the jurisdictional issue under the FSIA.[129] In an effort to foreclose the immunity defense to OPEC, the plaintiffs relied upon the "commercial activity" exception of the Act.[130] Thus, the crucial issue became whether the defendant's activities could be characterized as "commercial" within the meaning of the statute.[131]

IAM insisted that the Court focus solely on the specific activity of "price-fixing,"[132] which was presumably done for profit and, thus, was within the scope of the exception.[133] Instead, the Court characterized the defendant's activity as "the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource . . . from its territory."[134] Relying on the statute's legislative intent,[135] the Court recognized that an activity in which only a sovereign may engage is noncommercial.[136] The Court concluded that the control over a nation's natural resources, in this case oil, was a sovereign act,[137] and a voluntary agreement among the member nations to engage in such control remained a sovereign act.[138] Accordingly, the Court ruled OPEC's actions as

---

127. See *supra* note 8.

128. See *supra* note 29.

129. 477 F. Supp. 553, 565-69. The District Court acquired subject matter jurisdiction under 28 U.S.C. 1330(a). Under this section, however, jurisdiction applies only when a foreign state is not entitled to immunity. Consequently, the first question the Court addressed was whether the plaintiff presented evidence sufficient to support the Court's jurisdiction. *Id.* at 565.

130. The Court reasoned that the exception upon which the plaintiff relies is found in 28 U.S.C. § 1605(a)(2), which excepts from immunity "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

131. The Court noted that "[a]n act or activity can be defined broadly, such as 'hiring of employees,' an activity carried on by private parties, and thus, 'commercial,' or it can be defined narrowly, such as 'employment of diplomatic, civil service or military personnel,' a governmental activity." 477 F. Supp at 567.

132. *Id.*

133. See *supra* note 122.

134. 477 F. Supp. at 567. To support its position the court relied on international legal principles which recognize that "a sovereign state has the sole power to control its natural resources." *Id. See* G.A. Res. 1803, § I(1), 17 U.N. GAOR, Supp. (No. 16) 29, 2d Comm. 327, U.N. Doc. A/C2/5R 850 (1962). *Accord*, Charter of Economic Rights and Duties of States, G.A. Res. 3281, Ch. II, Art. 2(1), U.N. Doc. A/RES/3281 (XXIX) (1974).

135. 477 F. Supp. at 567. The legislative history of the FSIA limits immunity "to those cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are purely commercial in nature or those which private persons normally perform." [1976] U.S. CODE CONG. & AD. NEWS at 6613.

136. See *supra* note 135.

137. 477 F. Supp. at 568.

138. *Id.*

noncommercial and, therefore, entitled to immunity under the FSIA.[139]

The Court's focusing solely on OPEC's control over its natural resources fails to consider whether the means of implementing that control were commercial. Under the FSIA's "nature of the activity" test,[140] the Court's reasoning and conclusion appear faulty. As IAM pointed out on appeal, the statute requires a court to view the nature of the act itself, rather than the sovereign's underlying motivations or purpose.[141] Indeed, the correctness of the District Court's decision based on the FSIA has been the subject of criticism by numerous commentators.[142]

VII. THE COURT OF APPEALS' DECISION UNDER THE ACT OF STATE DOCTRINE

The Court of Appeals recognized the dilemma presented by an application of restrictive sovereign immunity. Under the FSIA, the courts will not refrain from adjudicating a suit arising from a sovereign's commercial activities.[143] The statute requires the courts to apply an objective "nature of the activity" test to determine whether the act in question is commercial.[144] IAM argued on appeal that the District Court's characterization of OPEC's activity departs from the statute's requirements.[145] Indeed, the Court of Appeals recognized that the District Court's characterization of OPEC's activity, "the establishment of the terms and conditions for the removal of a prime natural resource. . . ,"[146] was merely the purpose behind OPEC's action.[147] The act complained of, however,

---

139. *Id.* at 569. See *supra* note 5.

140. See *supra* note 122.

141. 649 F.2d 1354, 1358. See *supra* note 14.

142. *See* Note, *Sovereign Immunity—Jurisdictional Problems Involving the Foreign Sovereign Immunities Act and Extraterritorial Application of United States Antitrust Laws*, 13 VAND. J. TRANSNAT'L L. 835 (1981). Note, *Restrictive Immunity and the OPEC Cartel: A Critical Examination of the Foreign Sovereign Immunities Act and International Association of Machinists v. Organization of Petroleum Exporting Countries*, 8 HOFSTRA L. REV. 771 (1979-80). Comment, *The Suit Against OPEC: Foreign Sovereign Immunity in the United States*, 29 INT'L & COMP. L.Q. 508 (1980). For an alternative view, arguing that the decision was correctly decided *see*, Crocker, *Sovereign Immunity and the Suit Against OPEC*, 12 CASE W. RES. J. INT'L L. 215 (1980).

143. 28 U.S.C. §§ 1602, 1605(a)(2). See *supra* note 122.

144. See *supra* note 122 and accompanying text.

145. 649 F.2d 1354, 1358.

146. 477 F. Supp. 559, 567. For the rationale applied by the lower court in reaching this outcome, see *supra* notes 134-39 and accompanying text.

147. 649 F.2d at 1357 n.6. The Court of Appeals distinguished the two tests and

was OPEC's conspiracy to fix prices.[148] A court, properly applying the FSIA's mechanical "nature of the activity" test to the act of conspiring to fix prices, could arguably find it to be commercial in nature,[149] resulting in the subsequent denial of immunity to the OPEC nations.

In reaching its decision, however, the Court of Appeals, like the District Court, was cognizant of "the broader implications of an antitrust action against the OPEC nations."[150] To these nations, oil revenues represented their only significant source of income.[151] This dependence on oil clearly influenced the OPEC nations' attempts to control its production, extraction, and export.[152] OPEC's acts cannot be simplistically separated into the components of sovereignty or commercial activity, as the FSIA requires. Indeed, the District Court noted that OPEC's "price-fixing" activity has a significant sovereign component.[153] Therefore, a court's assessment of the propriety of OPEC's conspiracy to fix prices would inevitably involve a determination as to the validity of the sovereign's underlying purpose and motivation.[154] The Court of Appeals recognized that "while the FSIA ignores the underlying purpose of a state's action, the act of state doctrine does not."[155] Thus, the

---

demonstrated the effects on immunity under each.

> Two different tests arose to determine the character of state activity. One focused on the *purpose* of the activity, the other on the *nature* of the activity. The purpose test, which asks whether the act in question was undertaken for sovereign ends, is subjective. The nature test, which focuses on the nature of the act itself, is objective. The purpose test grants broader immunity, since even the most commercial activity could have an underlying governmental purpose. . . . For example, the purchase of furniture is objectively a commercial act. If the furniture is purchased for a state embassy, however, under the purpose test, the act is sovereign and immunity applies.

Id.

148. See notes 21-23 and accompanying text *supra*.

149. See note 122 *supra*. The act of conspiring to fix prices is undoubtedly done for profit and an act which an individual could engage in. Under the FSIA, either finding indicates a commercial activity. See *supra* notes 126, 130, 135 and accompanying text.

150. 649 F. 2d 1354, 1358.

151. *Id.*

152. See *supra* notes 14-16 and accompanying text.

153. 477 F. Supp. 553, 567. The Court of Appeals also noted that "consideration of their sovereignty cannot be separated from their near total dependence on oil." 649 F.2d at 1358.

154. 649 F.2d at 1358. Similar reasoning was applied by the Second Circuit to render the plaintiff's claim non-justiciable under the act of state doctrine in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir. 1977).

155. 649 F. Supp. at 1360. This Court stated earlier that the motivations of the sovereign must be examined for a public interest basis in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 607 (9th Cir. 1976). The Court of Appeals applied this logic

Court of Appeals reasoned that, under these circumstances, application of the act of state doctrine was warranted, "regardless of any commercial component of the activity involved."[156]

To support its application of the act of state defense, the Court relied on the theoretical bases underlying the doctrine.[157] Like the Supreme Court in *Sabbatino*, the instant court did not rely solely on the principle of sovereignty to support its decision.[158] Rather, the Court of Appeals focused on the doctrine's "constitutional underpinnings—the basic relationship between branches of government in a system of separation of powers."[159] The Court's reasoning under these principles provides support for its subsequent decision.

The Court of Appeals reasoned that the principle of separation of powers requires the courts to assume their primary role as interpreters of the Constitution and the laws of the United States. Similarly, it requires the President and Congress to assume their primary role in the "resolution of political conflict and the adoption of foreign policy."[160] To support its argument, the Court analyzed the institutional limitations of the judiciary in foreign relations. "The political branches of our government are able to consider the competing economic and political considerations . . . of a foreign policy issue."[161] Moreover, to achieve foreign policy objectives, the political branches have unique tools, in the form of protocol, compromise, delay, persuasion and economic sanctions, which are methods unavailable to, and inappropriate for, the judicial branch.[162]

---

stating: "[W]hen the state *qua* state acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty." 649 F.2d at 1360.

156. 649 F.2d at 1360.

157. 649 F.2d at 1358, *citing* Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

158. See *supra* note 50 and accompanying text.

159. 376 U.S. 398, 423. See *supra* text accompanying note 51.

160. 649 F. 2d at 1359, *citing* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Baker v. Carr, 369 U.S. 186 (1962). In *Baker*, the Supreme Court stated:

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's view.

Id. at 211.

161. 649 F.2d at 1358.

162. *Id.*

In contrast, the courts are obligated to simply apply established legal principles to the immediate dispute at bar in an apolitical context.[163] Moreover, the timing of decisions is not based on the importance of the issues involved. Instead, a decision may depend on the court's caseload and the delaying tactics employed by counsel.[164] Under these circumstances, the Court reasoned that it was inappropriate to engage in piecemeal and ill-timed adjudication involving the propriety of sovereign acts, at the risk of adversely affecting foreign policy.[165]

The Court of Appeals also noted other considerations warranting judicial restraint in this case. In an effort to avoid a rigid rule of application, the Court adopted the balancing approach suggested in *Sabbatino*.[166] Recognizing that "some aspects of international law touch more sharply on national nerves than do others,"[167] the Court announced that the "crucial element" is the potential for judicial interference with foreign relations.[168]

Relying on earlier cases which "judicially recognized the growing world energy crisis,"[169] the Court noted that the "availability of oil has become a significant factor in international relations."[170] Moreover, the record in this case contained extensive documentation of the involvement of the political branches with the oil question. Under these circumstances, the Court reasoned that any judicial determination would be detrimental.[171] Granting an injunction against the OPEC nations would insult the OPEC states and interfere with the efforts of the political branches to

---

163. *Id.*

164. *Id.*

165. *Id.* This was the rationale applied by the Supreme Court in *Sabbatino*. See *supra* note 52 and accompanying text.

166. 649 F.2d at 1360. See *supra* discussion accompanying notes 54-56.

167. 649 F.2d at 1360, *quoting* 376 U.S. at 428.

168. 649 F.2d at 1360, *quoting* 549 F.2d at 606.

169. *See* Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979) (dismissing an action to determine rights to oil in the Persian Gulf as raising a non-justiciable political question); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (affirming, under the act of state doctrine, dismissal of antitrust claim where the act complained of was part of "a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications for transcending those suggested by appellants").

170. 649 F.2d at 1360.

171. *Id.* at 1361. The Court of Appeals noted that "while the case is formulated as an anti-trust action, the granting of any relief would be in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources." *Id.*

seek favorable relations with them.[172] Conversely, if the Court found OPEC's actions legal, this " 'would greatly strengthen the bargaining hand' of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions."[173] Clearly, this case presented a situation where the potential for interference with our foreign relations was overwhelming.

A further consideration addressed by the Court was the availability of internationally-accepted legal principles.[174] The Court of Appeals noted that there exists "no international consensus condemning cartels, royalties, and production agreements."[175] Under the *Sabbatino* balancing test, the complete lack of consensus in international law makes it inappropriate for the judiciary to render a decision in this case.[176]

The Court of Appeals' reasoning under established legal principles provides strong support for its decision to affirm the lower Court's dismissal of the plaintiff's claim. Together, the sensitive nature of the dispute, the institutional limitations of the judiciary, the sovereign component of the acts in question, and the lack of accepted principles of international law present a situation where judicial intervention is inappropriate. The act of state doctrine provides a sound basis for the courts to exercise such judicial restraint.

VIII. CONCLUSION

In determining whether to exercise extraterritorial jurisdiction in antitrust cases, a court must carefully balance two competing interests which arise when a foreign sovereign is involved in alleged misconduct. First, a court seeks to effectively enforce antitrust policies to protect American economic interests by proscribing conduct deemed anticompetitive. Second, the courts must respect the principles of sovereignty, especially when an affront to that sovereignty may arise from our ideological preferences for a free market economy. The Court of Appeals' balancing approach in the *OPEC* case provided an effective means for determining the

172. *Id.*

173. *Id. quoting* 376 U.S. at 432.

174. 649 F.2d at 1361. See *supra* note 55 and accompanying text.

175. *Id.* at 1361. The *amici* suggested that production quotes and royalties are accepted sovereign practices, *citing*, the Connally Hot Oil Act, 15 U.S.C. § 715; the United States payment to farmers not to produce wheat; and Japan's voluntary reduction of TV and automobile production to maintain prices. *Id.* n.9.

176. *Id.* at 1361. See *supra* note 56 and accompanying text.

weight to be given to these competing interests in this particular case. The court's subsequent decision to exercise judicial restraint under the act of state doctrine clearly indicates that, under the circumstances, our foreign policy needs with respect to the OPEC nations outweighed the competing interests of antitrust enforcement.

Despite the possibility of developing an argument that OPEC's price-fixing falls within the commercial exception to the FSIA, the District Court was almost certainly correct in holding otherwise and dismissing the defendants' claims. An initial consideration is the unlikely possibility of enforcing a decision holding the OPEC nations liable for price-fixing. An additional consideration is that an injunction against the OPEC states would result in enjoining sovereign acts which allow OPEC members to achieve a measure of economic and political independence. Yet, the explicit language of the FSIA fails to consider whether the acts in question constitute elements central to a sovereign's economic and social policy. Indeed, these concerns were specifically rejected by the FSIA's drafters as factors to be considered in resolving questions of immunity. If, however, the judiciary is to accept its assigned role of deciding sovereign immunity questions, and the resulting consequences, the courts must consider these factors in cases which involve the commercial acts of sovereign nations. If not, a primary function of sovereign immunity, the prevention of unnecessary conflicts among nations, will be severely curtailed. Because these considerations cannot be read into the statute's definition of "commercial activities" in appropriate cases, these concerns are properly addressed by the act of state doctrine.

The *OPEC* decision's major impact is its reaffirmation of the act of state doctrine as a prudential principle designed to avoid judicial determinations in politically sensitive areas. To argue that this case involves a sensitive issue is a gross understatement. Indeed, it is plausible that the suit against OPEC is the type of case for which the Supreme Court must have intended the act of state doctrine to be exercised. The doctrine recognizes both the institutional limitation of the judiciary and the expertise of the other branches of government in foreign affairs. Because the act of state doctrine addresses concerns central to our system of government, it must necessarily remain a part of our jurisprudence. The *OPEC* decision assures this result.

Joseph J. Wielebinski