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IAM v. OPEC: Political Question or Commercial Activity

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IAM v. OPEC:
POLITICAL QUESTION OR COMMERCIAL ACTIVITY?

An analysis of the recent suit brought by the International Association of Machinists and Aerospace Workers (hereinafter IAM) against the Organization of Petroleum Exporting Countries (hereinafter OPEC)[1] and its thirteen members[2] emphasizes the growing necessity for judicial and legislative action, both municipally and internationally, to establish an effective order for the world economy. The courts of the United States and, moreover, any international adjudicatory body, be it the United Nations or an international arbitral tribunal, will be called upon in the future to make decisions concerning the impact of such international commodity organizations.

In its suit IAM charged that the price-setting activities of OPEC and its thirteen member nations violated Section 1 of the Sherman Act.[3] The injury IAM alleged was the payment, by its members, of

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1. Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979).

2. OPEC members as of the date suit was initiated were Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates and Venezuela.

3. Section 1 of the Sherman Anti-Trust Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several

higher prices for gasoline at the service station pumps as a consequence of OPEC's anticompetitive actions.[4] IAM requested damages under Section 4 of the Clayton Act[5] and injunctive relief under Section 16 of the Clayton Act[6] to enjoin the price setting activities of OPEC and its member nations.

Jurisdiction was claimed to be based upon the Foreign Sovereign Immunities Act of 1976[7] (hereinafter FSIA) as well as upon

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States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1976).

4. 477 F. Supp. at 559 (C.D. Cal. 1979).

5. Section 15 of the Clayton Anti-Trust Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained . . . .

15 U.S.C. § 15 (1976).

6. 15 U.S.C. § 26 states in part:

Any person, firm, corporation, or association, shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . .

7. 28 U.S.C. §§ 1330(d), 1391, 1441(d), 1602-1611 (1976). The FSIA provides for a general scheme of immunities of foreign states from the jurisdiction of United States courts. It in fact codifies the so-called restrictive theory of sovereign immunity, whereby the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). Although the restrictive view was nominally approved of by the Department of State in its "Tate Letter," 26 DEP'T STATE BULL. 984 (1952), there has always been an avenue of escape for nations whereby they could request the Department to make a formal suggestion of immunity to the courts. The Act, then, relieves the Department of State from entering the decision-making process and leaves the question of im-

the Sherman and Clayton Acts.

The court initially found that OPEC could not legally be served under the FSIA as it is not a foreign sovereign[8] and so dismissed the organization from the lawsuit.[9]

The court proceeded to discuss the claims against the thirteen nation defendants, and dismissed the damage portion of IAM's claim. The court found that IAM had not alleged any direct purchase of oil from the defendant nations. Thus, IAM was found to be an "indirect" purchaser of and from the defendants with respect to the gasoline it purchased in the United States.[10] As an indirect

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munity solely to the courts, as is customary in many other nations.

The provision invoked by the plaintiffs was 28 U.S.C. § 1605(a)(2) which provides in part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .

8. 28 U.S.C. § 1603(a) defines "foreign state" to include a "political subdivision of a foreign state or an agency or instrumentality of a foreign state." An agency or instrumentality of a foreign state is further defined to mean any entity: "(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof . . ."

9. The court also found that OPEC could not be served under the International Organizations Immunities Act because that Act applies only to those international organizations "in which the United States participates," 22 U.S.C. § 288 (1976); the United States does not participate in OPEC. 477 F. Supp. at 560.

10. The court stated that the plaintiff would demonstrate no more than that it bought gasoline at service station pumps in the United States that was, in part, refined in the United States by American companies from defendants' crude.

A particular defendant country first sold its crude at its ports. This crude was resold several times thereafter: through crude buyers, crude shippers, crude resellers and refineries. After the crude was re-refined into gasoline, it passed through gasoline distributors, marketing wholesalers and gasoline retailers and ultimately was purchased by the plaintiff at service station pumps. The plaintiff,

purchaser, IAM was precluded from seeking damages under the holding of *Illinois Brick Co. v. Illinois*[11] where the Supreme Court held that a plaintiff in a price fixing case may recover only if it had purchased directly from the alleged price fixer.[12]

As to IAM's request for injunctive relief based upon Section 16 of the Clayton Act,[13] the court found that while the Supreme Court had spoken clearly and definitively concerning an indirect purchaser's right to seek damages in *Illinois Brick*, that Court had not made a definitive statement concerning the right of an individual purchaser to seek injunctive relief. Viewing this issue as an open question, the court proceeded to analyze the rationale of the 3rd Circuit decision in *Mid-West Paper Products Co. v. Continental Group, Inc.*[14] where it was found that *Illinois Brick* and previous interpretations do not preclude an indirect purchaser from seeking injunctive relief. The Court of Appeals in *Mid-West Paper* concluded that, in contrast to a suit for damages, a claim for injunctive relief does not pose the same problems of duplicative or ruinous recoveries or the possibility of a trial burdened by complex economic analysis.[15] Fol-

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then, was not a direct purchaser of defendants' foreign crude, but at best, an indirect purchaser eight times removed from the defendants. *Id.* at 560-61.

11. 431 U.S. 720 (1977).

12. The court also denied plaintiff the use of the so-called pass-on or pass-through doctrine to establish recovery for damages. This theory would allow a plaintiff to establish antitrust injury by showing that the additional cost imposed upon him by the price-fixing defendants had been passed on to him by the first direct purchaser from the defendants and any intermediate purchasers along the line.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court rejected this doctrine as a defense. In *Hanover Shoe*, the defendant was accused of monopolizing shoe machinery and attempted to defend against this charge by asserting that the plaintiff was not injured by any acts committed by the defendant because the plaintiff, a shoe manufacturer, passed the additional costs along to the ultimate consumer.

In *Illinois Brick*, note 11 *supra*, the Supreme Court, interpreting its decision in *Hanover Shoe*, denied the offensive use of the pass-on theory. The Court reasoned that to allow the offensive but not the defensive use of the theory would create a serious risk of multiple liability for defendants. 431 U.S. at 730-31.

13. 15 U.S.C. § 26 (1976).

14. 596 F.2d 573 (3d Cir. 1979).

15. *Id.* at 590. The court compared Section 4 of the Clayton Act (dam-

lowing the same rationale, the court found that IAM, as an indirect purchaser, should not be precluded from seeking injunctive relief under the antitrust laws.[16]

Turning to the jurisdictional aspect of IAM's claim, the court proceeded to determine whether or not the thirteen member nations were immune from suit under the FSIA.[17] The crucial analysis for determining immunity under the FSIA is whether or not the activity engaged in by a foreign state is "governmental," thereby rendering the sovereign immune from suit, or "commercial," thereby rendering the sovereign amenable to suit as a private party would be.[18]

The court reviewed the present system of pricing mechanisms[19] used by the member nations and concluded that a narrow approach should be taken in defining "commercial activity."[20] Examining the legislative history[21] of the FSIA, the court was drawn to the conclusion that if the activities at issue were of the character which normally could be engaged in by a private party then a commercial activity could be assumed, but if the activity was one in which only

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ages) with Section 16 (injunctive relief) and found that § 16 does not base injunctive relief upon an already sustained injury, rather, that section makes relief available "against threatened loss or damage." Moreover, the court found that under § 16 the plaintiff only needs to demonstrate "a significant threat of injury" from impending antitrust violations and that a party may have standing to obtain injunctive relief even when he is denied standing to sue for treble damages. *Id.* at 591.

16. In the court's analysis there was a concern that if such plaintiffs are precluded from seeking injunctive relief they would be left totally without any remedy. Reasoning that Congress desired effective enforcement procedures under the antitrust law, the court interpreted Congress' intent to not exclude such a large class of plaintiffs from protection of the antitrust laws. 577 F. Supp. at 564.

17. Subject Matter jurisdiction is granted to the district courts to hear claims against foreign sovereigns under 28 U.S.C. § 1330(a).

18. Section 1603(d) defines "commercial activity" as follows:

> A commercial activity means 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.

19. 477 F. Supp. at 566.

20. *Id.* at 567.

21. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 16, *reprinted in*, [1976] U.S. CODE CONG. & AD. NEWS 6604 [hereinafter House Report].

a sovereign could engage, the activity would be considered non-commercial.[22]

The court found that the pricing mechanisms of OPEC countries were not the seminal nature of each nation's oil transactions, but rather it was production control which occupied these nations' activities.[23] The court concluded that the nature of the activity engaged in by the OPEC nations was the establishment by a sovereign state of the terms and conditions for the removal of its prime natural resource—oil.[24] The court looked to international law and cited a number of United Nations resolutions,[25] in which the United States had concurred, to back up its conclusion that a sovereign state has the exclusive power to control its own natural resources. Reasoning from this premise, the court was of the opinion that control over a nation's natural resources stemmed from the nature of its sovereignty,[26] and so, the establishment of terms and condi-

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22. House Report, [1976] U.S. CODE CONG. & AD. NEWS 6604, 6613.

23. 477 F. Supp. at 566. The court, quoting from expert testimony, stated:

> Control of supply is the essence of monopoly; price fixing the result . . . the OPEC nations can raise or lower the prices at will by controlling the output. Most of the (crude oil) price increases since 1970 have in fact resulted from output restriction. Prices have been raised by taxation and by direct price quotation. These two methods are convenient, but not necessary.

24. 477 F. Supp. at 567.

25. G.A. Res. 1803, 17 U.N. GAOR, 327, U.N. Doc. A/C 2/5 R 850 (1962). In part the Resolution states:

> The right of people and nations to permanent sovereignty over their national wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the State concerned.

We should note that although the court cited the 1962 General Assembly Resolution, to which the United States agreed, the other cited resolutions had been voted against or abstained from by the United States.

26. The court drew upon certain domestic activities analogous to a nation's role in the marketing of its wealth and natural resources. Citing *Parker v. Brown*, 317 U.S. 341 (1943), the Court said that it has been recognized that a government has the power to restrict competition of an item to protect the public welfare and this, necessarily, is a governmental activity. *Parker* involved an antitrust challenge to a California state program which controlled the marketing of raisins grown in the state so as to restrict competition among the growers

tions for removal of a natural resource from its territory, when done by a sovereign state, is a governmental activity, and therefore not subject to suit.[27] The court rejected plaintiff's contention that regardless of this governmental action, the activities of the OPEC nations in conspiring to fix prices were commercial.[28] Upon finding that the OPEC nations' activities were not commercial, the Court said that the defendant nations were entitled to immunity under the FSIA and that therefore the court lacked subject matter jurisdiction.[29]

Going beyond this aspect of the sovereign immunity claim, the court addressed some additional concerns in an antitrust suit of this nature. The court found that even if subject matter jurisdiction did exist IAM would still be precluded from its claim because a foreign sovereign is not considered a "person" for purposes of Sherman Act liability.[30] Citing *Parker v. Brown*[31] for the proposition that a domestic state is not a person who may be sued under the antitrust laws, the court said the same holds true for foreign nations.[32] IAM's contention that subsequent interpretations of *Parker* had qualified its holding was similarly rejected by the court.[33]

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and maintain prices.

27. 477 F. Supp. at 568.

28. *Id.* at 569.

29. *Id.*

30. The Sherman Act, at U.S.C. § 7(8), and the Clayton Act, 15 U.S.C. § 12(1), define person "to include corporations and associations existing under or authorized by the laws of the Territories, the laws of any State, or the laws of a foreign country."

31. 317 U.S. 341 (1943).

32. 477 F. Supp. at 570. The court analyzed a series of cases where the status of nations as defendants under antitrust laws was discussed. In *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 78 n. 14 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), the court, in dicta, concluded that foreign sovereigns were not "persons" subject to Sherman Act liability. *Accord Interamerican Refining Corp. v. Texas Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

33. IAM claimed that *Parker* had lost its effectiveness through the decisions in *Goldfarb v. Virginia State Bar*, 421 U.S. 973 (1975), and *LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

In *Goldfarb* Sherman Act liability was claimed for a minimum fee schedule published by a local bar association, enforced by the Virginia State Bar. The Court found for the plaintiff and held that anticompetitive activities must be

The court went on to discuss the recent Supreme Court ruling in *Pfizer Inc. v. Government of India*[34] where it was held that a foreign nation may be a "person" under the antitrust laws as a plaintiff. The Court was unwilling to extend the *Pfizer* ruling to sovereign defendants, such as OPEC nations, citing an absence of any intent by Congress to so declare.[35]

Aside from the matter of whether OPEC as an organization could be held to antitrust liability, in cases where foreign cartels have been sued under the antitrust laws in United States courts, their members have been private business organizations, usually encouraged by their own states.[36] The question of whether or not the antitrust laws can be applied to conspiracies among nations which would otherwise violate our antitrust laws is a novel one and one that the

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compelled by direction of the state acting as a sovereign before the *Parker* doctrine may be used.

In *LaFayette* the Court held that municipalities should not be excluded from the reach of the antitrust laws, stating that the *Parker* exemption was limited to official action directed by the state.

The court in *OPEC* rejected both claims by IAM, ruling that the actions complained of were directly mandated by each sovereign nation of OPEC and no subdivisions of any of the member nations were involved.

34. 434 U.S. 308 (1978).

35. The court, in analyzing *Pfizer*, stated that the determining factor in such a case was that an adjudication by the courts did not interfere with sensitive matters of foreign policy. In contrast, allowing foreign nations to be sued under the antitrust laws would involve intrusion. 477 F. Supp. at 572.

36. *See, e.g.*, United States v. Sumatra Purchasing Co., Criminal No. 15-35 (S.D.N.Y. 1920); United States v. Deutsches Kalisyndikat Gesellschaft, Equity No. 41-124 (S.D.N.Y. 1929); United States v. 383,340 Oz of Quinine Derivatives, Admiralty No. 98-242 (S.D.N.Y. 1928); United States v. 5898 Cases of Sardines, Admiralty No. 105-37 (S.D.N.Y. 1930); United States v. The Tannin Corp., Criminal No. 113-260 (S.D.N.Y. 1942).

These older cases were not prosecuted to final judgment but they point to the fact that the United States has had a history of prosecuting foreign cartels under the antitrust laws. Brief for Gulf & Western Industries to the Attorney General of the United States, entitled *Analysis of OPEC's Status under the United States Antitrust Laws*, produced in 1975 by Messrs. Simpson, Thatcher & Bartlett and Paul, Weiss, Rifkind, Wharton & Garrison [hereinafter *OPEC Analysis Brief*].

court in *OPEC* failed to analyze fully.

In determining whether or not there was subject matter jurisdiction under the FSIA, the court took a narrow approach in defining the pivotal issue—commercial activity.[37] In contrast to the court's interpretation of the legislative history,[38] there is specific mention in the House Report[39] that would give to the courts an avenue for broad interpretation in defining commercial activity.[40] The factors the court chose to focus upon in determining the governmental nature of a nation's oil transactions can be viewed in a different light when the emphasis is not on the individual production policy but, rather, upon the efforts of the member nations, individually and in concert, to fix prices for their product.

OPEC members, through nationalization of the interests of oil companies and other measures, have taken an actual ownership interest in the production and pricing of crude oil.[41] Thus, these

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37. This Court agrees that this "commercial activity" should be defined narrowly. This determination, while based partially on the factor mentioned above, is premised primarily on the recognition that a court must base its ruling on specific facts. By basing a ruling on a *generalized* view of the evidence, a court may be basing its ruling on half-truths.

477 F. Supp. at 567 (emphasis in the original).

38. House Report, [1976] U.S. CODE CONG. & AD. NEWS 6604, 6615.

39. *Id.*

40. "The courts would have a great deal of latitude in determining what is 'commercial activity' for the purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." *Id.*

41. Every OPEC member has ownership interests in the oil companies operating within its territory. The governments of Iran and Iraq have total ownership and control of production. The remaining OPEC members have stated their intention of acquiring 100% ownership in the near future. Presently these latter countries have controlling interests in the producing companies, usually on a 60%—40% basis.

The following is a breakdown of each nation's structure in oil transactions:

Algeria Sonatrach is the government enterprise, controlling 75%-80% of Algeria's oil flow.

Ecuador The government-owned company CEPE has twenty-year service contracts with foreign oil companies. The government takes 85% of the profits.

Indonesia Pertamina is the state-owned oil and gas agency. Approximately 35

nations have actually stepped into the shoes of the international oil corporations. Moreover, many member nation companies have gone beyond mere pricing/production activity and are engaged in building refineries and tanker fleets.[42]

The legislative history emphasizes that the type of business that these nations are engaged in was to be encompassed within the definition of commercial activity.[43] Yet the court concluded that

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companies have production sharing contracts with Pertamina.

Iran Total government ownership through the National Iranian Oil Company (NIOC).

Iraq Total government ownership through Iraq National Oil Company (INOC).

Kuwait Total government ownership through Kuwait National Oil Company.

Libya The Libyan National Oil Company intends a 100% takeover in the future but extracts 85% of profits from foreign oil companies operating in Libya.

Nigeria The Nigerian National Oil Company has a 55% interest in producing companies (Royal Dutch Shell and British Petroleum).

Qatar Direct government ownership of oil-producing facilities; near 100% but Shell Oil still has some interest.

Saudi Arabia Petromin is the state-owned oil company and transacts in concert with American companies under Aramco.

United Arab Emirates The Abu Dhabi National Oil Company, established in 1971, has plans to acquire 100% of the oil production facilities.

Venezuela Venezuelan Petroleum Corporation (CVP) is moving towards 100% control when present concessions expire in the 1980s.

Compiled from *OPEC Analysis Brief*, Appendix A and K. HOSSAIN, LAW AND POLICY IN PETROLEUM DEVELOPMENT (1979).

42. Iraq, Iran, Saudi Arabia and OAPEC, the Organization of Arab Petroleum Exporting Countries, have completed, or are in the process of completing, ventures into tanker fleets for shipping oil. Moreover, these countries are working on exploration projects for oil in other parts of the world. *OPEC Analysis Brief* at *A-1*.

43. A regular course of commercial conduct includes the carrying on of a commercial enterprise such as a mineral extracting company. . . . Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. . . . Activities such as a foreign government's sale of a service or a product . . . would be among those included within the

the nature of the activity, controlling production, was purely a governmental activity derived from each nation's status as a sovereign.[44] It is true that these nations' policies concerning oil production are a function of their governments, but can it be said that the nature of the activity is, therefore, purely governmental simply because oil happens to be the primary product of the OPEC nations? At what point does a government policy setting supply quotas metamorphose into the proprietary function of selling the product?[45]

In taking a narrow approach in defining "commercial activity" the Court was guided by its understanding of the legislative intent that the FSIA was meant "to keep our courts away from those areas that touch very closely upon the sensitive nerves of foreign countries."[46] Reviewing that history we find there is evidence that the Court was misguided in its interpretation of the purposes of the Act. We find that the stated purpose of the Act is not a guide for courts to determine when they shouldn't address matters which may involve a nation's sensitive policy concerns, but rather to rid the Executive departments of burdensome questions of sovereign immunity,

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definition.

House Report, [1976] U.S. CODE CONG. & AD. NEWS 6604, 6614-15.

44. 477 F. Supp. at 568-69 n. 14.

45. The court noted that the proprietary function of the OPEC nations was preceded by the governmental function and concluded that the essential nature of the activity was therefore governmental. This anomalous conclusion bears no connection to the legislative history nor to comparable situations which are necessarily commercial.

In an era of growing socialism, governments worldwide do engage in commercial enterprises. The restrictive theory of sovereign immunity is followed in socialist as well as capitalist countries and merely holds that when a government does engage in a commercial enterprise it, like private enterprise, is accountable in the courts of other nations.

One commentator has stated that the reason for the restrictive theory evolving to the majority view was the fact that states were becoming increasingly involved in commercial and trading activities. In particular, the appearance of the Soviet Union in international affairs propelled the restrictive theory, the thought being that the Soviets shouldn't be able to hide under the claim of sovereignty. *See*, von Mehren, *Foreign Sovereign Immunity Act of 1976*, 17 COL. J. TRANS. LAW 33 (1978).

46. 477 F. Supp. at 567.

thereby reducing the foreign policy implications of such tasks.[47] The Act, therefore, provides a clear mandate for courts to apply the law and to make decisions on a neutral basis.

In determining the governmental/commercial issue the court examined certain principles of international law,[48] in particular the right of nations to control their own natural resources. In contrast to this principle, when we look to the commercial nature of cartel activity we find a history in international law which was meant to thwart restrictive trade practices. In the Charter of the United Nations[49] the principles of international economic cooperation are clearly delineated. Among these are that efforts should be made by all nations to create conditions of world economic stability and to find solutions, cooperatively, to world economic ills. The actions of restrictive trade practices, such as those taken by OPEC, are obviously not meant to promote such higher principles.

Similarly, in 1947-48 representatives of 53 nations, including the United States, drafted the so-called Havana Charter[50] establishing an International Trade Organization (ITO). Primary among its concerns was the inclusion of articles designed to remedy the destructive effects of "cartelization" of international trade.[51] As

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47. "Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influence upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." House Report, [1976] U.S. CODE CONG. & AD. NEWS 6604, 6606.

48. 477 F. Supp. at 567.

49. U.N. CHARTER art. 55.

50. Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 1089 (1949). The Charter was initially promoted by the United States but was never acted upon by the Senate.

51. I.T.O. CHARTER art. 46. This article dealt exclusively with restrictive practices, e.g., price fixing and production limitations. The General Agreement on Tariffs and Trade (GATT) is the vestige of the doomed I.T.O. Still, the stated purposes of this agreement are the "reduction of tariffs and other barriers to trade and . . . the elimination of discriminatory treatment in international commerce. . . ." T.I.A.S. No. 1700, 55 U.N.T.S. 308.

recently as 1975, the United Nations has reiterated its call for the goal of stability in world economic order under the Charter of Economic Rights and Duties of States.[52] To say, on the one hand, that international law allows a nation to control its own natural resources, as the court stated, while closing its eyes to the purposes behind that control, clearly inapposite of stated international principles, is to disregard the larger global context within which nation states transact. The court failed to grasp the dynamics of the conflicting policies and took the narrow approach.

The court went on to discuss the extraterritorial application of antitrust laws to foreign nations. Under Section 1 of the Sherman Act[53] two jurisdictional requirements are posed: (1) that there be a restraint of United States commerce; and (2) that the violations occur in the context of interstate or foreign commerce.

When the conduct allegedly constituting restraint of trade is committed entirely outside of the United States the question then posed is whether or not the activity has some effect upon United States commerce.[54] In the landmark case of *United States v. Aluminum Co. of America*[55] (hereinafter *Alcoa*) the potential of the antitrust laws in combating foreign cartels was recognized. There, Judge Learned Hand concluded that although Congress did not intend the Act to prohibit conduct having no effect in the United States, it did intend the Act to reach conduct having consequences within this country.

The key to liability under the antitrust laws for acts committed

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52. 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). Under Article 5, states do have a right to associate in organizations of prime commodity producers but those countries have a reciprocal duty not to prohibit the "promotion of sustained growth of the world economy."

53. *See* note 3, *supra*.

54. *See American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

55. 148 F.2d 416 (2d Cir. 1945). *Alcoa* involved a cartel agreement between French, German, Swiss and British ingot producers, and a Canadian subsidiary of Alcoa, Limited. These firms had formed a Swiss corporation, Alliance, and had subscribed to its stock in proportion to their production capacities. Under the agreement, Alliance fixed the production quotas. *See also United States v. The Watchmakers of Switzerland Information Center, Inc.* [1963] TRADE CASES (CCH) ¶ 70,600 (S.D.N.Y. 1962).

abroad is, as Judge Hand declared, whether such agreements among foreign producers are intended to, and do, have a direct and substantial impact on commerce in the United States. It is apparent that this test is fully satisfied by the actions of OPEC nations. The price increases promoted by OPEC not only have increased the price of crude oil imported into this country, but have resulted in raising the prices of most goods and services and creating widespread unemployment and economic dislocation.

The recent Ninth Circuit decision in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*[56] (hereinafter *Timberlane*) suggests a "balancing of foreign interests" approach in determining whether or not a court should apply American antitrust laws extraterritorially.[57] The Court proposed a number of elements to be analyzed in weighing the interests at stake:

> The elements to be weighed include the 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.[58]

The court in *Timberlane* then says that if there are still sufficient interests of the United States at stake, application of the laws is proper.

Applying these factors to the interests at stake in *OPEC* we find: (1) the conflict of policy and law between the United States

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56. 549 F.2d 597 (9th Cir. 1976).

57. This balancing approach was followed by the Supreme Court in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In *Continental* the involvement of the Canadian government in the alleged monopolization was held not to require dismissal. The Court was of the opinion that there was no substantial involvement by the Canadian government and therefore the government's interest was considered slight when weighed against the American interest in thwarting restraint practices.

58. 549 F.2d at 614. These factors have also been endorsed by the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

and the OPEC nations is, on the surface, great but in reality not so diverse when we consider that these nations would similarly abhor restrictive practices in other commodity dealings, e.g., grain sales; (2) the nationalities involved include injuries to American plaintiffs and, moreover, these nations transact continually through United States corporations; (3) enforcing a judgment may seem a near impossibility but under the FSIA there are provisions authorizing execution upon the commercial assets of a sovereign nation if the property was used for the commercial activity upon which the claim was based[59]—(here we should recognize, e.g., an attachment proceeding upon the OPEC nations' profits maintained in accounts in United States banks); (4) the effects of OPEC nations' activities upon the United States economy has been dramatic, e.g., inflation, unemployment, depreciation of the dollar; (5) the purposeful actions of oil producing nations to harm the American economy and its consumer is manifest in sundry declarations by their oil ministers and heads of government; e.g., the Shah of Iran had frequently proposed tying the price of oil to the index of manufactured goods in the United States.[60]

From this analysis it would appear that such behavior on the part of OPEC nations was intended to affect United States commerce. Following the *Timberlane* reasoning there is an overwhelming interest in applying antitrust liability to counter the price-fixing activities of these nations.[61]

The court in *OPEC* addressed the problem of whether or not foreign sovereigns could be defendants in antitrust actions and concluded that a foreign sovereign is not a "person" within the meaning of the Sherman Act.[62] In support of this statutory interpretation, the court cited the recent decision in *Hunt v. Mobil Oil Corp.*[63] and the older decision in *Interamerican Refining Corporation v. Texaco Maracaibo, Inc.*[64] It is interesting to note that both of these cases

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59. 28 U.S.C. § 1610(a)(2) (1976).

60. OPEC WEEKLY BULL., Jan. 29, 1971, at 7.

61. The Third Circuit followed a similar balancing technique in Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

62. 477 F. Supp. at 571. *See* note 3, *supra.*

63. 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977).

64. 307 F. Supp. 1291 (D. Del. 1970).

were decided prior to the enactment of the FSIA[65] and involved no direct challenge to a foreign sovereign's actions. Those courts, only by way of dicta, discussed the foreign sovereign defendant issue. Thus, the interpretations by the court in *OPEC* would seem to revert us back to the outdated doctrine of *American Banana*, long criticized by subsequent decisions.[66]

It seems most likely that when the Sherman Act was adopted foreign governments were not intended to fall within the definition of "person." Sovereign states were engaged in their usual activities of sovereignty and not in commercial endeavors, as practiced on such a wide scale today. Early interpretations of the Sherman Act can be viewed as authorizing a broad and all-inclusive power over restrictive trade activities.[67] Indeed, the Act, similar to the Constitution, has been regarded as a broad charter which can be applied to new circumstances within its principles, even though the specific problem was not contemplated by its framers.[68]

The court in *OPEC* felt bound by the precedents holding against enforcing antitrust liability to foreign sovereigns. Yet when we look at the history of the FSIA, as originally proposed in Congress, we find specific mention of restrictive trade practices by

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65. In *Hunt v. Mobil Oil*, only Sherman Act and Wilson Tariff Act jurisdiction were claimed. Jurisdiction in *Inter American* was based on the Sherman Act and Clayton Act.

66. *See*, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949).

67. In Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59 (1911), the Court said that an all-embracing, generic enumeration was essential to ensure that those new forms of contract or combination that unduly restrained interstate or foreign commerce would not escape condemnation.

Further, the generic enumeration used in the statute, together with the absence of any definition of restraint of trade, permitted but one conclusion: the express design of the statute was to fix clearly the ulterior boundaries that cannot be transgressed with impunity and thus to allow reasonable application of the public policy embodied in the statute without unnecessarily limiting its enforcement by precise definition. 221 U.S. at 63-64.

68. In Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933), the Court stated: "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions."

nations as a cause of action within the reach of the Act.[69] Additionally, the court was unwilling to extend the recent *Pfizer*[70] decision which opened American courts to foreign government plaintiffs under the antitrust laws, holding there that nations were "persons" within the meaning of the Sherman Act. It would seem that when the spirit of the Sherman Act is violated by governments, application of the law should not be impaired by favoring governments for purposes of remedies while exempting them for purposes of liability. OPEC nations have in the past utilized our courts to prosecute claims arising from their commercial activities. There seems to be little justification for using a double standard in order to immunize their commercial activities from judicial scrutiny.

The activities of the OPEC nations have injured the interests of the United States severely and if such activity were carried on by private parties it would clearly violate the law. The policy of the case law and the FSIA is not to protect government commercial action under sovereign immunity. The court in *OPEC* failed to consider the larger implications of this destructive activity and approached the problem narrowly.

Considering the serious domestic impacts and the adverse impacts on the friendly oil-consuming nations, the court should have been more responsive to the elasticity which is permitted in the interpretation of the antitrust laws. It would seem that a new perspective on antitrust applicability is needed to meet modern economic dilemmas in a world where nations fail to adhere to common principles of fair trading and maximum economic growth.

Idealistic as this may sound, we will most certainly be faced in the future with similar prime commodity cartel arrangements, modeled after OPEC, as the world depletes the bulk of its resources more rapidly than it can develop them. One method for stemming the prospect of future economic instability and dislocation is for our institutions, including our courts, to realize their great duty as decision makers.

Charles G. Sturcken

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69. It was stated in the section analysis to the legislation proposed in 1973 that a cause of action arising out of restrictive trade practices by an agency or instrumentality of a foreign state having a direct effect within the territory of the United States would be within the purview of the Act. H.R. REP. No. 3493, 93d Cong. 1st Sess. 41 (1973).

70. Pfizer Inc. v. Government of India, 434 U.S. 308 (1978).