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

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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

The extent to which one sovereign can assert jurisdiction over another1 is a question that lies at the heart of international law jurisprudence and our general conception of the state.2 Under the weltanschauung existing from the Reformation3 through the turn of the twentieth century,4 sovereigns enjoyed absolute immunity from


2. The discipline of international law is concerned in large part with defining the limits of state sovereignty. The sovereignty of individual nations is limited by the development of an alternative body of normative law that stands exterior to the law of any state or by the subjection of one state to the laws of another sovereign. See generally R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 18 (1970); H. Kelsen, PRINCIPLES OF INTERNATIONAL LAW 248-50, 307-08, 551-58 (2d ed. R. Tucker ed. 1966); H. LAUTERPACHT, SOVEREIGNTY AND FEDERATION IN INTERNATIONAL LAW, in III INTERNATIONAL LAW 5 (1977); I. OPPENHEIM, INTERNATIONAL LAW § 70 (5th ed. 1937); J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 256, 260-61 (1968); Lauterpacht, The Nature of International Law and General Jurisprudence, 12 ECONOMICA 301 (1932).


4. See R. FALK, supra note 2, at 19-20; A. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW 26-88 (1923); C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 3-44 (F. Corbett trans. 1968); Falk, A New Paradigm for International Legal Studies: Prospects and Proposals, 84 YALE L.J. 969,
suit in either their own courts or the courts of other nations. As the definition of the state changed, and as nations became more involved in commerce, sovereign immunity ceased to be absolute. Instead a number of decisions began to differentiate between a state’s sovereign and nonsovereign activities, granting immunity for the former and denying it for the latter. By the midtwentieth century, the liability of a sovereign for tortious and commercial activities was well established outside the Soviet bloc. This development, referred to as restrictive immunity, was recently enacted by Congress into positive law in the United States. The Foreign Sovereign Immunities Act (FSIA) empowers United States courts to assert jurisdiction over foreign states and their agencies and instrumentalities when the dispute results from, among other things, the foreign state’s commercial activity. Conversely, the Act grants foreign states immunity for their governmental or public activities.

The problems inherent in differentiating between a state’s

982-93 (1975); Lane, Demanding Human Rights: A Change in the World Legal Order, 6 Hofstra L. Rev. 269, 270-78 (1978).


7. See Lauterpacht, supra note 1, at 250-72 app.


10. Id. §§ 1604-1605.

11. Id. The Act establishes the affirmative defense of sovereign immunity. Once the defendant produces evidence to establish that it is a foreign state or one of its subdivisions, agencies or instrumentalities . . . and that the plaintiff’s claim relates to a public act of the foreign state[,] . . . the burden of going forward [then] shift[s] to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

Commercial and governmental activities recently surfaced in an antitrust suit brought by the International Association of Machinists and Aerospace Workers (IAM) in federal district court in California against the Organization of the Petroleum Exporting Countries (OPEC) and its member states. Plaintiffs sought treble damages under the Sherman and Clayton Antitrust Acts, alleging that they had been forced to pay artificially high gasoline prices because of the defendants' alleged restraint of trade and price-fixing activities. In addition to monetary damages, the IAM sought to enjoin future price fixing. The court held that the price-fixing activities of the OPEC nations are "governmental" and "public" in nature and thus immune from suit in United States courts. The OPEC case is important not only because the underlying substantive issues affect the present world energy dilemma, but also because it is one of the few decisions dealing with the commercial activity provisions of the FSIA.

16. Id. at 21.
17. 477 F. Supp. at 569.

There have been various cases where the activity appears to be plainly commercial but where the court held the commercial activity provision of the FSIA inapplicable due to the absence of a "substantial effect within the United States" as required by 28 U.S.C. § 1603(e) (1976). See Amoco Overseas Oil Co. v. Compagnie

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This Note criticizes the court’s conclusions as contrary to the intent and dictates of the FSIA. It begins by setting forth the origins and general principles of sovereign immunity and discusses its evolution in the United States. The broad outline of the immunity provided to foreign sovereigns by the FSIA and the latitude given the judicial branch in construing the definition of sovereign immunity and commercial activity are delineated. IAM v. OPEC and the

Nationale Algerienne de Navigation, 605 F.2d 648 (2d Cir. 1979) (proceeding by attachment to secure jurisdiction over clearly commercial activity is invalid under FSIA since there were no minimum contacts and Act abolished in rem jurisdiction); Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979) (per curiam) (breach of oil supply contract with Bahamian subsidiary of American corporation held immune because defendant company did not engage in continuous and systematic activity in United States); Paterson, Ltd. v. Compania United Arrows, S.A., 493 F. Supp. 626 (S.D.N.Y. 1980) (state-owned company held immune from responsibility for lost cargo under contract provisions because of absence of direct effect in and lack of defendant's contacts with United States); Waukesha Engine Div., Dresser Americas, Inc. v. Banco Nat'l de Fomento Cooperative, 485 F. Supp. 490 (E.D. Wis. 1980) (breach of sales contract held immune because performance of contract in United States insufficient contact for jurisdiction).


Before the enactment of the FSIA there were several recent cases that sought to resolve the governmental-commercial distinction in the context of the restrictive theory of sovereign immunity. Perhaps most significant was the decision in Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964) (contract for shipment of wheat held not immune due to contractual agreement to arbitrate), cert. denied, 381 U.S. 934 (1965). Other significant cases included, Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.) (State Department suggestion for immunity conclusive even though breach of wheat shipment agreement commercial activity), cert. denied, 404 U.S. 985 (1971); Heaney v. Government of Spain, 445 F.2d 501 (2d Cir. 1971) (breach of agreement to generate adverse publicity against another foreign sovereign held governmental activity); Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.) (breach of wheat sales contract held commercial activity), cert. denied, 385 U.S. 931 (1966); National Am. Corp. v. Federal Republic of Nigeria, 420 F. Supp. 954 (S.D.N.Y. 1976) (factual question as to whether contract to purchase cement was for public use at time of contract); Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974) (breach of sales contract for patrol boats, armed helicopters, and guns held governmental and therefore immune); Pan Am. Tankers Corp. v. Republic of Vietnam, 296 F. Supp. 361 (S.D.N.Y. 1969) (breach of contract to transport cement held commercial activity).

court’s reasoning are analyzed in terms of general restrictive immunity principles and the specific terms of the FSIA. This analysis reveals that the court erred in its determination of immunity and that jurisdiction should have been maintained. The ramifications of this conclusion are also explored. Should an injunction against the alleged antitrust violations of the OPEC nations be granted, it would have grave foreign policy consequences for the United States. In jurisprudential terms, the application of United States antitrust laws to the actions of OPEC nations would represent a shift in the traditional notions of sovereignty that have governed the conduct of independent states since the days of the Reformation.

DEVELOPMENT OF SOVEREIGN IMMUNITY

General Principles

Absolute immunity.—With the demise of the Holy Roman Empire and the hegemony of the Roman Catholic Church, the unified order of Medieval Europe was replaced by the decentralized world of independent nation-states. Each state possesses absolute sovereignty, defined as plenary power within its territorial boundaries. At the inception of this world order, sovereignty within each


state was vested in the single figure of the monarch. Since the ability to create law is the chief attribute of sovereignty, the monarch alone possessed this authority. The sovereign's plenary powers were limited only by God, the laws of nature, or self-restraint. This power structure would have been undermined if the monarch had been forced to submit to the jurisdiction of the courts and laws he or she had created. The monarch thus remained above the commands of positive law. In the international arena, the assertion of jurisdiction over another sovereign subjected that sovereign to the other's commands, thereby creating a feudal relationship between the two or implying a source of sovereignty superior to both sovereigns. Either violated the principle of independent equality between states.

Restrictive Immunity.—Sovereign immunity evolved to keep pace with the changing nature of the state and the world economic order. Prior to any actual diminishment of immunity, the theoretical foundations for an altered view of the state were laid by Locke and Rousseau. Both philosophers placed the locus of sovereignty with the citizens of the state and predicated the state's legitimacy on the continuing consent of the governed. Since the state's legitimacy was no longer premised on the maintenance of superiority

24. J. Bodin, supra note 17, at *156-59; see C. Behrens, The Ancien Régime 86, 105-07 (1967).
27. T. Hobbes, supra note 21, at *91-92.
28. See Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Holmes, J.); J. Bodin, supra note 21, at *98-101. The subjection of the sovereign to suit in his or her own courts, as was the case in France for the enforcement of contracts, was based on theories of natural law or implied consent. Id. at *92-93, *106-07; J. Franklin, Jean Bodin and the Rise of Absolutist Theory 79-85 (1973).
30. See The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.); text accompanying note 50 infra. See also I L. Oppenheim, supra note 2, §§ 70, 116a.
over its citizens, submission to jurisdiction in its own courts no longer threatened the stability of the state. Similarly, submitting to jurisdiction in another sovereign's courts no longer posed the same threat to the state's internal political structure. The refusal by a sovereign to submit to the judgment of a foreign nation's court on activities undertaken or having an effect within the court's jurisdiction implies a superiority to the law. Submission to jurisdiction therefore furthers notions of comity by ensuring that no nation holds itself above the laws of another. Problems arise when dealing with the internal acts of a sovereign having effects within another state. The assertion of jurisdiction by the affected state brings the sovereignty of the two states into conflict. Since sovereignty is defined under the current international order as plenary power within defined geographic boundaries, both states have a legitimate claim to freedom from outside interference: the state asserting jurisdiction has the right to protect itself from outside influences, and the state against whom jurisdiction is asserted has the right to regulate its internal affairs and conduct its activities without answering to another authority. The conundrum is the result of a concurrent growth in the interdependence of nation-states and the maintenance of traditional notions of independent, decentralized sovereignty.

The most clear-cut diminution of sovereign immunity has occurred in the realm of a state's commercial activities. The industrial revolution produced a dramatic increase in the level of international commercial activity. In contrast to the mercantile system of the past, this activity was based on commercial trades between equals. While most of the increased commercial activity was

33. The FSIA extends jurisdiction to both. 28 U.S.C. § 1605(a)(2) (1976). This is substantially similar to the results reached by the common law See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
34. See Lauterpacht, supra note 1, at 229-32.
35. See H. Kelsen, supra note 2, at 307-43; text accompanying note 21 supra.
38. See A. Milward & S. Saul, supra note 36, at 470-85; cf. id. at 505 (primary purpose of whatever trade there still was with colonies was to benefit colonial pow-
carried on by private individuals, the changing world economic order brought nations into greater contact with one another and the citizens of foreign states. Some of this contact invariably involved state-controlled commercial enterprises, such as state-trading monopolies or commercial vessels. In addition, the state frequently found itself in the position of a consumer, buying goods from foreign merchants. Refusing to submit disputes involving these commercial activities to judicial resolution could frequently come only at the expense of disrupting the orderly functioning of the commercial system.

In this new order, immunity continued to be provided to sovereignties for their public, governmental acts; it was denied, however, for a government's private, commercial activities. When a nation acts in a commercial capacity, the rationales of absolute immunity lose much of their force. Engaging in commercial activity does not rest on the power to compel conduct. Rather, the ability to engage in the activity is shared equally with private persons, and it needs no greater source of legitimacy than the acts of a private individual. Therefore, when a state engages in commercial ac-


40. See S. SUCHARITKUL, supra note 1, at 115-26, 390-25; Fawcett, Legal Aspects of State Trading, 25 BRIT. Y.B. INT'L L. 34 (1948); Sanborn, supra note 1. For an account of recent developments in state trading, see Hazard, supra note 39.

41. See S. SUCHARITKUL, supra note 1, at 323. For accounts of recent developments, see Behrman, State Trading by Underdeveloped Countries, 24 LAW & CONTEMP. PROB. 454 (1959); Mikesell & Wells, State Trading in the Sino-Soviet Bloc, 24 LAW & CONTEMP. PROB. 435 (1959); Ouin, State Trading in Western Europe, 24 LAW & CONTEMP. PROB. 388 (1959).

42. See Sanborn, supra note 1; Weston, Actions Against the Property of Sovereigns, 32 HARV. L. REV. 266 (1919).

43. See S. SUCHARITKUL, supra note 1, at 324.


45. The distinction is discussed in S. SUCHARITKUL, supra note 1, at 313-25; Deák, supra note 1, at 430-38. For critique of this distinction, see II D. O'CONNELL, supra note 1, at 224-26; Lauterpacht, supra note 1, at 236-41. For an early examination of judicial developments in the theory of restrictive immunity, see Harvard Draft Convention, supra note 5, Part III. See also E. ALLEN, supra note 1, at 300-02.
tivity, the preservation of independence and equality between sovereign nations is not undermined by the assertion of jurisdiction.

Whether an activity is designated commercial or sovereign usually hinges on which aspect of the activity becomes the focus of the court's inquiry. When a foreign nation purchases boots for its army, is the activity commercial or governmental? If a court considers the purpose for which the boots are purchased, it will conclude that the foreign nation is equipping its militia, a governmental activity.\(^{46}\) If a court focuses instead on the nature of the activity, it will conclude that the state has simply entered into a commercial contract. Under this "juridical nature" analysis, the reason or purpose for the activity is irrelevant and the activity is characterized solely on the basis of whether the nature of the activity is one in which private, nonsovereign persons can engage.\(^{47}\) To the extent that the state always acts for a public purpose, the nature of the activity is a more appropriate inquiry.

The Law of Sovereign Immunity in the United States

Absolute Immunity.—In 1812, the Supreme Court in *Schooner*

\(^{46}\) This situation is discussed by Mr. Timberg. He concludes that the activity in question should be characterized by its nature and not by its purpose. See Timberg, supra note 18, at 15-16.

\(^{47}\) The juridical nature test was developed by Professor Weiss in his article *Compétence ou l'Incompétence des Tribunaux à l'égard des États Étrangers*, (1923) 1 *Académie de Droit International de La Haye, Recueil des Cours* 525. The article is discussed at length in Lauterpacht, supra note 1, at 225. Professor Lauterpacht criticized Weiss' nature test as leading to absurd results and ultimately delaying the real sensitive issues involved for sovereign immunity. In discussing contracts that will be deemed commercial under the nature test Lauterpacht states: "Individuals do not purchase shoes for their armies, they do not buy warships for the use of the state, they are not as such, responsible for the management of the national economy." *Id.* at 224. Despite Lauterpacht's criticisms of the juridical nature test, he would abolish sovereign immunity except where it would be contradictory to notions of comity. *Id.* at 237-39. For the views of other writers critical of the juridical nature test, see Note, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 *Yale L.J.* 1148, 1163 (1954) (lack of satisfactory criteria). Both of these commentators were equally dissatisfied with the purpose test and considered State Department suggestions to be the best resolution of the problem. See generally text accompanying notes 59-65 infra.

Courts employing the nature test have arrived at different conclusions for the very same activities. In two separate cases involving the shipment of grain, the Second Circuit considered the earlier case commercial activity and the latter public and therefore immune. Compare *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971), with *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966). For other illustrations of inconsistencies and the practical advantages of the nature test, see Timberg, supra note 18, at 15-16.
Exchange v. McFaddon \(^{48}\) unanimously held that international law prohibits a domestic court from asserting jurisdiction over a foreign sovereign. \(^{49}\) The libellants attached the ship and maintained that it had been misappropriated by the Emperor Napoleon. Chief Justice Marshall wrote for the Court that

> [o]ne 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 only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. \(^{50}\)

Despite this strong statement about comity, Chief Justice Marshall in dicta distinguished between the warship at issue and the personal property of a prince acquired in a foreign state that may “possibly be considered as [subject] to the territorial jurisdiction” of a foreign state. \(^{51}\) Later courts maintained that the Schooner holding was limited to military property and reached different results when immunity was claimed for a merchant vessel or the commercial activities of a foreign sovereign. \(^{52}\)

This narrow reading of Schooner was rejected by the Supreme Court in 1926 in Berizzi Bros. v. Steamship Pesaro. \(^{53}\) The libel in rem of a merchant vessel owned by the Italian government was dismissed on the premise that international law precluded the assertion of jurisdiction over a foreign sovereign or its property. \(^{54}\) The Court refused to distinguish between merchant vessels and warships; instead, it maintained that a foreign sovereign’s merchant vessels are “public ships in the same sense that warships are.” \(^{55}\) The Schooner dicta intimating that jurisdiction may exist over the

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48. 11 U.S. (7 Cranch) 116 (1812).
49. Id. at 146.
50. Id. at 137.
51. Id. at 137.
52. The qualifying language in Schooner Exchange is cited as foreshadowing the adoption of the restrictive principle of sovereign immunity. See United States v. Wilder, 28 F. Cas. 601, 604 (C.C.D. Mass. 1838) (No. 16,694) (opinion per then-Judge Story); The Pesaro, 277 F. 473, 475-76 (S.D.N.Y. 1921), vacated and dismissed for lack of juris., 13 F.2d 468 (S.D.N.Y.), aff’d sub nom. Berrizi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926); Timberg, supra note 18, at 5-6.
53. 271 U.S. 562 (1926).
54. Id. at 574.
55. Id.
private acquisitions of foreign sovereigns within the domestic nation was distinguished on the grounds that states were generally not engaged in commercial trading at the time the case was considered. The Court found "no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force." Focusing on the purposes of the activity, the Supreme Court characterized commercial activities as falling within the functions of government, and, in contrast to the growing trend in other countries, granted the state total immunity by denying the distinctions between commercial and public activities.

The Advent of Restrictive Immunity and the Role of the State Department.—In the 1940's the Supreme Court adopted the view that since the issue of sovereign immunity is replete with questions of diplomacy, the courts will defer to the suggestions of the Department of State on issues of sovereign immunity for foreign nations. In 1952 the State Department adopted the restrictive theory of sovereign immunity. The State Department believed that such action was necessary because absolute immunity was inconsistent with the acceptance of restrictive immunity by all the nations of the world except Great Britain and the Soviet-bloc countries, the United States' voluntary submission to the jurisdiction of

56. Id. at 573. Although never commanding a majority, this position has been adopted by a number of Supreme Court Justices in a domestic immunity context. See New York v. United States, 326 U.S. 572, 591-98 (Douglas, J., dissenting, joined by Black, J.).

57. Id. at 574.

58. See Harvard Draft Convention, supra note 5, Part III.

59. In Ex parte Republic of Peru, 318 U.S. 578 (1943), and Republic of Mexico v. Hoffman, 324 U.S. 30 (1945), the Court adopted the position that decisions concerning sovereign immunity are closely tied to the foreign relations of the United States. In the former case the Court recognized that the State Department was superior to the judiciary in its expertise and information on the result a grant or denial of immunity would have on American foreign relations. Moreover, disputes were deemed better resolved through diplomatic channels, which took into account foreign relations, than through the "compulsions of judicial proceedings." 318 U.S. at 588-89. In Republic of Peru it became the "duty" of courts to abstain from adjudication when the State Department suggested that a denial of sovereign immunity would adversely affect foreign relations. Id. In Hoffman the Court held that conclusive effect should be given to State Department suggestions in order to eliminate potential embarrassment in maintaining foreign relations. 324 U.S. at 35-36.

60. Letter from Jack B. Tate, Acting Legal Advisor of the Dep't of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEPT STATE BULL. 984 (1952) and Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682, 714 app. 2 (1976).
foreign courts, and the increasing commercial interaction between private individuals and state entities. A procedure was adopted that entitled a foreign state to a departmental hearing to determine if its activity was commercial or governmental. A major drawback of this policy was its lack of guidelines for what constituted commercial activity. Since a refusal by the State Department of a direct request from a foreign state to recommend immunity had potential repercussions for United States foreign relations, the State Department frequently found itself caught in the middle between a desire to adhere to a theory of restrictive immunity and pressures from foreign states to recommend immunity. This ad hoc decisionmaking led to inconsistent rulings concerning when a sovereign was entitled to immunity.


63. For critical analyses of State Department decisionmaking and its function in the American law of sovereign immunity prior to the adoption of the FSIA, see Jessup, supra note 62, at 169; Lyons, supra note 62; Note, supra note 62. See also Lyons, Conclusiveness of the Statements of the Executive—Continental and Latin American Practice, 25 BRIT. Y.B. INT’L L. 180 (1946). For defenses of the practice of State Department immunity suggestions, see Note, supra note 1; Comment, supra note 47, at 1163.

64. The State Department would offer or suggest immunity in order to achieve certain political ends. A case that exemplifies this type of political trade is Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961), where the Department traded a suggestion of immunity for the return of a hijacked airliner. See Timberg, Sovereign Immunity, State Trading, Socialism and Self-Deception, 56 NW. L. REV. 109, 116 (1961).

65. For a discussion of the inconsistencies in the cases, see Timberg, supra note 18, at 15-16.
The judicial decisionmaking that took place when the State Department made no recommendation produced confusion and inconsistencies, not rational legal doctrine. In two cases decided within five years of each other, the Second Circuit arrived at inconsistent conclusions as to whether a shipment of wheat was a commercial activity. A number of courts only considered the purpose for which a commercial transaction was entered, while others looked solely to the nature of the transaction. As international commercial trading continued to grow, and as the theory of restrictive immunity developed, political decisionmaking on the basis of diplomatic considerations became increasingly inappropriate. Private individuals entering into transactions with governmental entities could not be sure of obtaining judicial relief for breaches of contract. The foreign policy needs of the United States, its trading activities, and the world business community were thus best served by the development of a theory of restrictive immunity based on legal principle and a consistent body of precedent. In 1973 the State Department and the Department of Justice began to lobby for legislation that would end the State Department's involvement and codify the restrictive theory of sovereign immunity.

FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act of 1976 was enacted with four basic goals. First, it codified the restrictive theory of sovereign immunity. Second, immunity questions were recommitted

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66. See note 47 supra.
to the judiciary.\textsuperscript{72} Third, a statutory system for making service of process was established. In place of the old in rem and quasi in rem system, in personam jurisdiction was provided if the defendant had the minimum contacts necessary for the assertion of in personam jurisdiction in a domestic context.\textsuperscript{73} Fourth, jurisdiction was provided for the execution of judgments.\textsuperscript{74} The FSIA thus eliminated the State Department as the decisionmaking body for immunity and established a system whereby sovereign immunity would be determined by the judicial branch in accordance with legal principle and not political expedience.\textsuperscript{75} This brought the United States into step with the great majority of nations.\textsuperscript{76}

A precise definition of commercial activity was rejected as impractical,\textsuperscript{77} and instead the term was defined broadly as a "regular course of commercial conduct or a particular transaction or act."\textsuperscript{78} The FSIA restricted judicial discretion in defining commercial activity by incorporating the juridical-nature test\textsuperscript{79} into its definition of commercial activity. The House Report states that

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. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes commercial activity.\textsuperscript{80}

This limits the parameters of the judicial inquiry to the form of the transaction or activity. If the state is a party to a commercial con-

\textsuperscript{72} Id., reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6606.
\textsuperscript{74} H.R. REP. No. 1487, supra note 11, at 8, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6606.
\textsuperscript{75} \textit{See} supra note 1, at 250-72 app.
\textsuperscript{76} H.R. REP. No. 1487, supra note 11, at 7, 9, 12, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6605, 6607-08, 6610; Lauterpacht, supra note 1, at 250-72 app.
\textsuperscript{79} \textit{See} Id.
tract, the court’s focus is the making of that contract. Any consideration of the intended use of the goods procured by the contract is not only irrelevant, but improper under the Act. In assessing the transaction or activity, the House Report indicated that courts should ask whether the activity is either ordinarily engaged in by private persons or “customarily carried on for profit.”

The characterization given to an activity will frequently turn on which nation’s customs are to control the definition of commercial activity. The conflict between competing claims of sovereignty makes the decision difficult. If the domestic nation’s definition controls, then it imposes its notions of business organization on the other state. If the foreign state’s definition controls, the sovereignty and autonomy of the domestic state is diminished by its inability to assert its laws where it has a legitimate interest in doing so to protect its citizens. The conflict is less onerous when the foreign state acts directly within the territorial borders of the state asserting jurisdiction. Turning Chief Judge Marshall’s words in Schooner on their head, the foreign sovereign implicitly agrees to abide by the customs and laws of the domestic state when it engages in activities there. The difficult problems arise when jurisdiction is asserted on the basis of the effects of a foreign state’s activities undertaken completely outside the territory of the state asserting jurisdiction.

81. Mr. von Mehren focuses on the existence of a contractual relationship in determining when a foreign nation’s activity is commercial. When the state seeks to undo its previous contractual obligation for concession rights, investment, or loan agreements by expropriation through its legislative organ or by executive fiat, the state’s initial choice to enter into a contract should be determinative that the activity is commercial. See Von Mehren, supra note 70, at 54-58. In effect, the commercial relationship between the plaintiff and the foreign sovereign will dictate the result if existing obligations are breached regardless of the form by which the defendant state seeks to break off the relationship. The approach suggested by Von Mehren makes sense in that it prevents states from abusing those powers that are essentially governmental to get out of existing commercial obligations. “The state, having chosen initially to enter into a contract through the juridically private act of contracting cannot assert that it is acting governmental when it breaches its contract, irrespective of the manner in which it accomplishes its breach, whether by legislative or executive action.” Id. at 54. See Texaco Overseas Petroleum Co. (Libyan Arab Republic), 104 J. Droit Int’l 305, 17 Int’l Legal Mat. 1 (Int’l Arb. Trib. 1977); text accompanying note 183 infra.


83. See text accompanying note 35 supra.

84. See text accompanying note 50 supra.

85. Cf. I. BROWNLIE, supra note 1, at 326-27 (advocating legislation that would establish express waiver as precondition for doing business within jurisdiction, thus satisfying Chief Justice Marshall’s criteria in Schooner).
In an age of growing interaction and interdependence, significant internal activity will almost always have foreseeable ripple effects throughout the world. This is especially true when discussing the conduct of state-owned production and trading companies. If the company does not conduct any business activity within the state asserting jurisdiction, findings of implicit waiver are less persuasive and an assertion of jurisdiction represents potential infringement on the sovereignty of the foreign nation.

While the FSIA does not address the issue directly, its language indicates that the framers clearly intended American standards to apply. For example, in explaining the Act's definition of commercial activity, the House Report enumerated a number of specific examples, including "the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation." This is inconsistent with the planned econo-
mies of a number of states. If the American definition did not apply, these states could maintain that the operation of a mineral extraction company is, by their own national standards, a governmental activity. Rather than extrapolate a definition from a purely hypothetical world-wide consensus, a foreign sovereign trader bears the risk of domestic trade regulation when it engages in commercial activities that directly affect the lives of the domestic state's citizens. Commentators are generally in agreement that the laws and customs of the forum state should govern. They have reached this conclusion primarily on the ground that it is impossible to discern any universal definition of commercial activity.87

**IAM v. OPEC**

The basic claim in *IAM v. OPEC*88 was that OPEC and its member nations violated the antitrust laws by engaging in price-fixing activities.89 Plaintiff maintained that fixing the selling price of crude oil resulted in higher gasoline prices.90 The union sought treble damages for the allegedly artificially high price union members paid for gasoline91 and an injunction enjoining future price-fixing activities.92 For jurisdiction to be maintained under the FSIA, plaintiff had to establish that the alleged price-fixing activities of the defendants were commercial activity.93 Specifically, plaintiff contended that OPEC and its member nations established a uniform floor price for crude oil by mutual agreement on posted prices, taxes, or royalty rates.94 The union also claimed that each defendant nation engaged in, and profited from, the commercial

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90. *Id.* at 19-20.

91. *Id.* at 21.

92. *Id.*


sale of oil through state-owned oil companies or through state participation in private companies. 95

None of the defendants responded to plaintiff's charges. 96 The court dismissed OPEC as a separate defendant because it was not a state entity subject to jurisdiction under the FSIA. 97 Amici curiae for the individual OPEC nations maintained that the defendants' activities were governmental in nature and therefore accorded immunity by the FSIA. They contended that the OPEC nations were engaging in a traditional act of sovereignty by exercising control over their natural resources. 98 One amicus brief argued that since

95. Id. at 7-11, 14. None of the private oil companies were joined in the action, even though it was alleged that they took part in the conspiracy that formed the gravamen of plaintiff's complaint.

96. 477 F. Supp. at 559-60. Since none of the defendants answered the complaint, an affirmative defense of sovereign immunity was not asserted under the procedure provided in 28 U.S.C. § 1604 (1976). See note 11 supra. Under the FSIA a default judgment may not be entered "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e) (1976). Since sovereign immunity is a question of subject matter jurisdiction, 28 U.S.C. § 1330(a); H.R. Rep. No. 1487, supra note 11, at 13, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6611-12, the court was required to raise it on its own motion if it believed that it might not exist, FED. R. CIV. P. 12(h)(3). The court consolidated plaintiff's motions for default and preliminary injunctive relief with the trial on the injunction. Amici curiae represented the OPEC members at trial and through briefs. 477 F. Supp. at 559-60.

97. Since OPEC was neither a foreign sovereignty nor an agency or instrumentality of one, it could not be served under the FSIA. 28 U.S.C. § 1602 (1976). See 447 F. Supp. at 560. A state agency under 28 U.S.C. § 1603(b) (1976) is defined as:

(b) An "agency or instrumentality of a foreign state" means 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, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.


98. E.g., Memorandum of Law of the Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry As Amicus Curiae In Opposition to Motion for a Preliminary Injunction and Entry of Default Judgments at 28-32, International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1978) [hereinafter cited as OPEC Amicus Curiae]. As set forth in the brief:

The control over a nation's natural resources stems from the nature of sovereignty. The sovereign defendants' control over their oil resources is an especially sovereign function because oil, as the primary, if not sole, revenue producing resource, is crucial to the welfare of their nation's peoples.
oil is the primary revenue-producing resource for each defendant, the controls on pricing and production were necessary to maximize state revenues.\textsuperscript{99} They were therefore governmental activity.\textsuperscript{100} Furthermore, the brief argued, activities of the state-owned producing companies, which are admittedly commercial in nature, were separate and distinct from the state’s establishment of pricing and production controls, which formed the gravamen of plaintiff’s complaint and which the brief argued were governmental in nature.\textsuperscript{101} The central issue in the case was how to characterize the price-fixing activities. Each side maintained divergent positions about both the nature of the activity and the significance to be accorded to the commercial components of the state-owned companies’ activity.

The court held that it lacked subject matter jurisdiction under the FSIA.\textsuperscript{102} The price-fixing activities of the defendants were held to be governmental in nature, and the commercial activity exception was deemed inapplicable.\textsuperscript{103} Federal District Court Judge Hauk’s decision was based in part upon the suit’s effect on “the sensitive nerves of foreign countries.”\textsuperscript{104} The holding was, however, the direct product of narrowly defining the defendants’ activity as “the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource—to wit, crude oil from its territory.”\textsuperscript{105}

The court found that the OPEC nations’ joint setting of oil prices was merely an agreement on “how each will perform certain sovereign acts.”\textsuperscript{106} In a long footnote, the court analyzed the relationship between the activities of the OPEC nations as sellers of oil through their state-owned oil companies and the nations price-fixing activities.\textsuperscript{107} It concluded that the two were separate and

\begin{itemize}
  \item The necessary mechanism to maximize revenue from natural resources effectively is control of pricing and production.
  \item Id. at 29-30 (footnote omitted).
  \item Id. at 30.
  \item Id. at 23-24.
  \item 477 F. Supp. at 569.
  \item Id. at 568.
  \item Id. at 567. This concern is implied in the basic comity notions of sovereign immunity. See note 59 \textit{supra}. However, the FSIA codified the restrictive theory of sovereign immunity and political considerations were expressly deemed irrelevant to the commercial activity inquiry. See text accompanying note 75 \textit{supra}; text accompanying notes 118-147 \textit{infra}.
  \item 477 F. Supp. at 567.
  \item Id. at 568-69.
  \item Id. at 568 n.14.
\end{itemize}
that the sale of oil by the state-owned companies bore no relevance
to characterizing the price-fixing activity. While the court did find
that the removal of oil and the terms of its withdrawal are
controlled by the state-owned extracting companies, the court
maintained that such activities simply alter the method or medium
for exercising a sovereign function; they do not change the nature
of the function.\textsuperscript{108}

Although the court held that it lacked subject matter jurisdic-
tion under the FSIA, it nonetheless proceeded to consider the
merits of plaintiff's claim. Plaintiff's action for damages was dis-
missed because plaintiffs were "indirect purchasers" and therefore
precluded under \textit{Illinois Brick Co. v. Illinois}\textsuperscript{109} from any monetary
relief for violations of the antitrust laws.\textsuperscript{110} However, the court
held that even as indirect purchasers, plaintiffs could obtain
injunctive relief if they established proximate cause between their
injury and the defendants' activity.\textsuperscript{111} The court found that the
price-fixing activities did not produce the increase in the purchase
price of gasoline, and thus the requisite nexus was absent.\textsuperscript{112}
Irrespective of whether this nexus exists, the court maintained that
a foreign state could not be made a defendant in an antitrust action
because it was not a person within the meaning of section one of
the Sherman Act.\textsuperscript{113} However, since the court held that it lacked
jurisdiction to consider the case, these findings were necessarily
dicta.

\section*{CRITIQUE}

\textbf{The Judiciary's Proper Role}

Judge Hauk acknowledged that in resolving the issue of juris-
diction, "the determining factor is how the court defines the act or
activity."\textsuperscript{114} Despite the clear instructions in the House Report to

\begin{flushleft}
\textsuperscript{108} \textit{Id.}.
\textsuperscript{110} The court maintained that plaintiff's purchase of oil products was eight
steps removed from the defendants' alleged price-fixing activities. 477 F. Supp. at
561.
\textsuperscript{111} The court agreed with the reasoning in Mid-West Paper Prods. Co. v. Con-
tinental Group, Inc., 593 F.2d 573 (3d Cir. 1979), maintaining that Congress did not
intend to totally exclude 'indirect purchasers' from the protection of the antitrust
laws and injunctive relief would be an available remedy. 477 F. Supp. at 564.
\textsuperscript{112} 477 F. Supp. at 574.
\textsuperscript{113} \textit{Id.} at 572 (citing 15 U.S.C. § 1 (1976)). For a critique of this statement, see
text accompanying notes 198-203 infra.
\textsuperscript{114} 477 F. Supp. at 567.
\end{flushleft}
construe broadly the commercial activity provision, Judge Hauk read the Report as granting him the discretion to define an activity broadly or narrowly. He concluded that a narrow interpretation of the defendants' activity would comport with the “specific evidence” in the case and the FSIA intent to keep courts away from politically sensitive areas where they could damage United States relations with other nations.

While the Act shuns a specific definition of commercial activity and confers upon the judiciary, in the words of the House Report, “a great deal of latitude” in defining that term, Judge Hauk misconstrued the scope of his discretion. First, the Act and the House Report set forth a series of general principles and rules which mandate that commercial activity be construed broadly to encompass a wide range of activity. Second, the history of sovereign immunity in the United States, the House Report, and the language of the Act itself make it clear that “foreign sensibilities” and diplomatic considerations are inappropriate when resolving sovereign immunity questions.

Judge Hauk's reference to “foreign sensibilities” is a variant of political question doctrine. This doctrine does not support deference to diplomatic considerations for many of the same reasons that made “foreign sensibilities” irrelevant when construing the Act itself. Political question doctrine exists to keep each branch of government in its proper place by preventing the judiciary from deciding questions that are more properly the province of one of the political branches of government. While foreign relations are generally considered beyond the scope of judicial authority, this

117. Id.
119. See notes 77-87 supra and accompanying text.
120. See notes 59-70 supra and accompanying text.
is not the case if the rationales for the political question doctrine are not implicated.\textsuperscript{125}

In \textit{Baker v. Carr},\textsuperscript{126} the Supreme Court set out those elements that go to deciding if an issue is a political question.

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has \textit{one or more elements which identify it as essentially a function of the separation of powers}. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.\textsuperscript{127}

The \textit{Baker} Court recognized that all of these factors ensure a proper separation of powers.\textsuperscript{128}

Considering them in order: An issue is a political question if the court finds "a textually demonstrable constitutional commitment of the issue to a coordinate political department."\textsuperscript{129} Commentary on political question doctrine generally seeks to divide the issue into mandatory refusal of jurisdiction when an issue is


\textsuperscript{126} 369 U.S. 186 (1962).

\textsuperscript{127} \textit{Id} at 217 (emphasis added).

\textsuperscript{128} \textit{Id}. at 210-11, 213, 217.

\textsuperscript{129} \textit{Id}. at 217. This perhaps frames the issue too narrowly since it has come to be recognized that the broad reading given the national government's foreign affairs powers by United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), and other cases is based on extra-constitutional considerations. \textit{See} L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 15-28 (1972); Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory, 55 \textit{Yale L.J.} 467 (1946). Yet it is clear that foreign relations has been an integral part of the political question doctrine. \textit{See} L. Tribe, AMERICAN CONSTITUTIONAL LAW 76 n.35 (1976); Scharpf, \textit{supra} note 125, at 541.
committed by the Constitution to a coordinate branch of government, and discretionary refusals of jurisdiction when prudential considerations counsel against judicial resolution of the claim.\footnote{130}{See L. Tribe, supra note 129, at 79. Compare A. Bickel, The Least Dangerous Branch 184 (1962), and L. Hand, The Bill of Rights 15-18 (1958), with Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 7-9 (1959).}
The first criterion enunciated by the Baker Court falls into the first branch of political question doctrine.

Foreign affairs are commonly viewed as being committed to the executive.\footnote{131}{See sources notes 129 & 130 supra.} Yet, it appears that whatever the basis of the holdings in Republic of Mexico v. Hoffman\footnote{132}{324 U.S. 30 (1945).} and Ex Parte Republic of Peru,\footnote{133}{318 U.S. 578 (1943).} in which the Supreme Court mandated that the judiciary defer to executive determinations of immunity,\footnote{134}{See note 59 supra and accompanying text.} the Court apparently does not currently consider deference constitutionally mandated.\footnote{135}{L. Henkin, supra note 129, at 60 n.*. See, e.g., Alfred Dunhill, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).} This places sovereign immunity questions within the scope of permissible judicial review.

The next two elements delineated by the Court, "[no] judicially discoverable and manageable standards for resolving [the question, and] the impossibility of deciding [the question] without an initial policy determination of a kind clearly for nonjudicial discretion,"\footnote{136}{369 U.S. at 217.} are really other facets of the first criterion. If the question does not lend itself to judicial resolution or if its resolution requires an initial policy determination by a political branch of government, then the question, almost by definition, has been committed to a coordinate department. In the area of sovereign immunity, courts have been resolving the issue since Chief Justice Marshall decided Schooner Exchange v. McFadden in 1812.\footnote{137}{11 U.S. (7 Cranch) 116 (1812).} In committing questions of sovereign immunity to the judiciary, Congress and the President apparently felt confident that these issues could be resolved on the basis of legal principles.\footnote{138}{See text accompanying notes 48-51 supra.}

The next criterion set out by the Court, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government,"\footnote{139}{369 U.S. at 217.} is part
of the discretionary branch of political question doctrine.\textsuperscript{140} In the realm of prudential considerations designed to maintain the appropriate separation of powers, it seems clear that the other branches of government are free to relinquish their decisionmaking roles and have the questions decided in accordance with legal principle. In the past when the executive refused to make a determination on a request for sovereign immunity, the court would determine the question on the basis of legal principle.\textsuperscript{141} The Court in \textit{Baker v. Carr} lists these decisions as examples of judicial determinations in the field of foreign relations not precluded by the political question doctrine.\textsuperscript{142} The only change is that the political branches deference to the judiciary is no longer being made on a case-by-case basis, but is asserted instead in a blanket pronouncement.

The next two factors will also be considered together: "[The question indicates] an unusual need for unquestioning adherence to a political decision already made; or the potentiality [exists] of embarrassment from multifarious pronouncements by various departments on one question."\textsuperscript{143} In a series of announcements by the State Department and three Presidents, the executive branch has made it clear that its policy towards the OPEC nations is cooperation and conciliation.\textsuperscript{144} While the maintenance of jurisdiction...
in an antitrust case may be at odds with this policy, the House Report makes it clear that questions of jurisdiction are to be decided solely by the judiciary “on purely legal grounds,”145 and that the FSIA “sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states.”146 A deference to executive pronouncements to resolve sovereign immunity questions would inject political and diplomatic considerations into what the Act unqualifiedly sought to establish as an area in which decisions would be made on the basis of legal principles alone.

It was thus a violation of the FSIA for the OPEC court to infuse diplomatic considerations into sovereign immunity issues on political question or other grounds. This result obtains, not because of judicial interpretation of the court’s proper role, but from an act of Congress signed into law by the President. It is the political branches themselves who have mandated that their pronouncements on these questions not be accorded any weight by the coordinate branch of government. Therefore, no separation of powers values are implicated by judicial resolution of the immunity question on the basis of legal principle alone.147

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F. W. Lane: Restrictive Immunity and the OPEC Cartel: A Critical Examination

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Narrowly Defining the Activity: A Substitute for Considering Purpose

The court focused exclusively on the OPEC nations' management of their natural resources and ignored the mechanism for that management. It dismissed the activities of the state-owned oil companies as merely the "medium" for managing the nations' natural resources. The language of the Act and the House Report both make it clear, however, that the medium is the proper focus of the inquiry. In defining commercial activity, for example, the House Report lists state-owned mineral mining companies as one example of a regular course of commercial conduct subject to jurisdiction under the Act.

The court's analysis in the OPEC case is similar to that in In re Investigation of World Arrangements, Etc. The Anglo-Iranian Oil Company, owned and controlled by the British Government, refused to comply with a request for its records by the United States Department of Justice for use in an antitrust investigation. The district court recognized that the British Government's ownership of a controlling share in the oil company was irrelevant in characterizing the activity. It concluded, however, that the company's activities were governmental because it found that the British Government acquired its interest in the company to ensure the British Fleet's oil supply. The court failed to recognize that ensuring naval oil supplies was only part of the company's activities. The British-Iranian Oil Company's principal activities were producing and selling oil for profit. Although the company was organized as a commercial entity, and although its operations were commercial in nature, the court nonetheless focused on only one

149. See text accompanying notes 79-81 supra. The juridical nature test was adapted because judicial decisions that looked to purpose held the same activity commercial in one case and governmental in another. Compare Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971), with Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1968). Eliminating from the inquiry the purpose for which the activity was engaged will permit more consistent and just results. However, the juridical nature test would be subverted should the very same activity be defined broadly by one court and narrowly by another.
150. See text accompanying note 86 supra.
152. Id. at 290.
153. Id.
aspect of the company's activity when characterizing the operations of the company as a whole. If Exxon agrees to supply oil to the United States Air Force for free, its overall activities would not become governmental. 155

The court in OPEC concluded its analysis of price fixing at the point where it could conceivably be characterized as sovereign activity. The allegations of price fixing were not limited to the removal of natural resources however. 156 While establishing production levels for oil is a means of managing and conserving the nation's natural resources, it is also a tool for regulating the market price for oil. 157 The internal price-fixing and production operations of each OPEC member are coordinated in response to the collective market-stabilization measures. This ensures a profitable return for the sales arrangements made by each nation's oil producing company. 158 As in the investigation of the Anglo-Iranian Oil Company, the court has scaled down the activities of the defendants and based its ruling on less than a full consideration of the activity at issue. The necessity of commercial sales for the relinquishment of natural resources was ignored by the court.

Removal of Resources: Misused Authority and Inconsequential Inquiry

After defining the activity as "the establishment by a foreign state of the terms and conditions for the removal of a prime natural resource," 159 the court sought to determine the nature of the activity. United Nations resolutions were cited as authority for the proposition that a sovereign state has the sole power to control its natural resources. 160 The court then examined Supreme Court de-

155. Timberg has also criticized the case. In his opinion the defendant was simply producing oil and its activities should not have been immunized under a jurisdictional nature test. Timberg, supra note 18, at 15.
156. See First Amended Complaint, supra note 15, at 17-19.
159. 477 F. Supp. at 567.
160. Id. (quoting G.A. Res. 1803 § I(1), 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R. 850 (1962)). This is not the first instance in which United Nations actions have been referred to in connection with OPEC nations' exercise of power over their natural resources. Dr. Hosni, former counsel to OPEC, cites them in support of the OPEC nations' right to determine the price of crude oil. Hosni, The Oil Producing Nations Emerging Right to Determine Oil Prices, 1 INT'L TRADE L.J. 154,
cisions and federal legislation and concluded that the exercise of control over natural resources by the state is always a sovereign function. There are several basic flaws with this syllogism. First, the United Nations resolutions\textsuperscript{161} define the rights and title to resources, they do not further the inquiry, in juridical-nature-test terms, into whether the mechanisms for the exercise of control is governmental or commercial. A more basic flaw is the incorrect conclusion that a nation's exercise of control over its natural resources is always an act of sovereignty. In assessing the status of United States law, the court failed to distinguish between state regulation of market conditions for private sellers and state regulation of the market to further its own proprietary interests.

The court relied on the Supreme Court's decision in \textit{Parker v. Brown}\textsuperscript{162} and the Federal Connally Hot Oil Act\textsuperscript{163}. In \textit{Parker}, a California agricultural program that established production controls to regulate the marketing of raisins was upheld as a proper "act of government"\textsuperscript{164} against an antitrust challenge.\textsuperscript{165} The Hot Oil Act was passed to facilitate state legislative efforts to maintain the price


\textsuperscript{162} 317 U.S. 341 (1943).

\textsuperscript{163} Ch. 18, 49 Stat. 30 (1935) (current version at 15 U.S.C. §§ 715-715m (1976)).


\textsuperscript{165} It is clear that if the marketing agreements were reached by parties with a proprietary interest, they would be per se violations of the antitrust laws. \textit{See} Parker v. Brown, 317 U.S. at 350.
of oil. This legislation was passed following large discoveries of new oil in east Texas that was being sold far below the prevailing domestic price.166

Both of those instances are distinguishable because the stabilization measures did not include the government's acquisition of a direct proprietary interest. They are therefore inapposite authority for the OPEC case. The state in both Parker and the Hot Oil Act did not have any commercial interest in, and remained separate and distinct from, the resulting commercial intercourse and the actual parties affected by the legislation.167 In contrast, the OPEC nations have a direct proprietary interest in establishing the terms for the marketing of crude oil. When the OPEC nations agree on a price it becomes the floor sales price for the commercial transactions between the state-owned or state-controlled companies and third parties; the two are inextricably related.168

Other Decisions Characterizing State Control over Resources in an Immunity Context

A number of courts have considered state control over natural resources in resolving other immunity questions. Three courts in three different settings relegated the state's claim that it was exercising control over its resources to secondary importance and denied immunity as a result of the commercial use of the resources.

In New York v. United States,169 New York claimed immunity from federal taxation on its sale of mineral water. New York argued that the sale of mineral waters was part of an effort to control its natural resources and was related to the state's conservation policy.170 Justice Frankfurter wrote for the Supreme Court:


167. See 317 U.S. at 345-49. The Hot Oil Act only created federal enforcement powers to prevent the shipment in interstate commerce of oil produced in violation of state laws designed to limit crude oil production. These state laws sought to stabilize prices in an extremely volatile market; the state had no proprietary interest at all in the sale. See Ryan v. Amazon Petroleum Corp., 71 F.2d 1, 3-4 (5th Cir. 1934), rev'd sub nom. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); United States v. Brumfield, 85 F. Supp. 696, 699 (W.D. La. 1949).

168. See J. BLAIR, supra note 154, at 279; Ø. NORENG, supra note 158, at 60-61.


170. Id. at 580-81.
New York urges that in the use it is making of Saratoga Springs it is engaged in the disposition of its natural resources. And so it is. But in doing so, it is engaged in an enterprise in which the state sells mineral waters in competition with private waters, the sale of which Congress has found necessary to tax as a source of revenue for carrying on the National Government. To say the states cannot be taxed for enterprises generally pursued, like the sale of mineral water, because it is somewhat connected with a State's conservation policy, is to invoke an irrelevance to the federal taxing power.  

The values of federalism present in intergovernmental immunities cases do not easily transpose into an international framework. The Court's analysis, however, is equally applicable to determinations of commercial activity under the FSIA since both inquiries ultimately concern whether the governmental activity should be accorded immunity and both seek to discern whether the activity at issue is commercial or governmental.  

In *United States v. Deutsches Kalisyndikat Gesellschaft*, a federal district court upheld jurisdiction in an antitrust indictment of a corporation controlled by the Republic of France. The defendant corporation interposed the defense of sovereign immunity, and the French Ambassador to the United States intervened in the action and asserted that the state-controlled company was exercising a sovereign function in its administration of the state's potash resources. Similar to the position of the OPEC amicus, the ambassador also stated that the monies derived from the sales of potash were turned over to the government for public use. As such, the activities were public in nature, and to maintain a suit against the company was to maintain a suit against the Republic of France. Although the court considered the commercial activities of the defendant to be carried on for the benefit of both the Re-

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171. *Id.*  
172. While Justice Frankfurter expresses dissatisfaction with attempts to differentiate between a state's governmental and trading activities and was reluctant to employ the distinction as a basis for deciding the immunity question, *id.* at 580, he ultimately fixes on a test that does just that, *id.* at 582. The exact test adopted by Justice Frankfurter is whether the congressional act applies to state and private persons alike and falls on both equally. *Id.*  
173. 31 F.2d 199 (S.D.N.Y. 1929).  
174. *Id.* at 200, 203.  
175. *Id.* at 200.  
176. See *OPEC Amicus Curiae*, *supra* note 98, at 29-32.  
177. 31 F.2d at 200-01.
public of France and private persons, the court considered the corporation separate and distinct from its stockholders. Therefore, the activities of the corporation are to be examined in their own right. That the Republic of France considered the conduct of its corporate agent to be governmental was not a sufficient basis upon which to grant immunity for ordinary commercial conduct.\textsuperscript{178}

Similarly in a recent international arbitration proceeding,\textsuperscript{179} the arbitrator deemed the nation's claim that it was exercising sovereign authority over its resources to be secondary to the state's commercial commitments with respect to those resources. In \textit{Texaco Overseas Petroleum Co. (Libyan Arab Republic)}, a number of oil companies sought compensation for the nationalization of their oil concession rights.\textsuperscript{180} Libya asserted immunity on the theory that the nationalization was an incident of its sovereign powers over its resources.\textsuperscript{181} The arbitrator ruled in favor of the oil companies, reasoning that the prior concession agreement was dispositive.\textsuperscript{182} He stated that

\begin{quote}
[t]he situation could be different only if one were to conclude that the exercise by a State of its right to nationalize places that State on a level outside of and superior to the contract and also to the international legal order itself, and constitutes an "act of government" which is beyond the scope of any judicial redress or any criticism.\textsuperscript{183}
\end{quote}

In each of these cases, the court focused on the use of the resources. It was conceded that the foreign state's exercise of control

\begin{itemize}
  \item \textsuperscript{178} The court stated that "[n]either principle nor precedent requires that this immunity . . . be extended to a foreign corporation merely because some of its stock is held by a foreign state, or because it is carrying on a commercial pursuit, which the foreign government regards governmental or public." \textit{Id.} at 203; accord, \textit{In re Investigation of World Arrangements, Etc.}, 13 F.R.D. 280, 290 (D.D.C. 1952), \textit{discussed at} text accompanying note 152 \textit{supra}.
  \item \textsuperscript{179} \textit{Texaco Overseas Petroleum Co. (Libyan Arab Republic)}, 104 J. Droit Int'l 350, 17 Int'l Legal Mat. 1 (Int'l Arb. Trib. 1977).
  \item \textsuperscript{180} \textit{Id.} at 350, 17 Int'l Legal Mat. at 4-5. The companies' concession rights were nationalized pursuant to two decrees of nationalization. The first was issued on September 1, 1973, and the second was issued on February 11, 1974. \textit{Id.} For an analysis of nationalization that characterizes the activity as commercial, see Von Mehren, \textit{supra} note 70, at 54 & n.86.
  \item \textsuperscript{181} 104 J. Droit Int'l at 374-75, 17 Int'l Legal Mat. at 27.
  \item \textsuperscript{182} The arbitrator stated that "in respect of the international law of contracts, a nationalization cannot prevail over an internationalized contract, containing stabilization clauses, entered into between a State and foreign private company." \textit{Id.} at 372, 17 Int'l Legal Mat. at 25.
  \item \textsuperscript{183} \textit{Id}.
\end{itemize}
over its resources was a function of sovereignty. Nonetheless, the immunity issue turned on whether the state or nation was using or had used its resources in a commercial manner. In the OPEC case, the court’s focus only on the exercise of control over resources improperly ignored the commercial use of the resources and its relationship to the defendants’ price-fixing activities. The cases demonstrate that the commercial use of resources is not only a relevant inquiry for sovereign immunity, but controlling.

**OPEC Nations: The Transition from Regulators to Traders**

The court’s opinion did not accord any weight to the basic changes that have occurred during the last decade in the production and sale of crude oil. Although the court recognized that OPEC nations engage in commercial activity through their state-owned producing companies, the court reasoned that “this does not mean, and the legislative intent does not support the conclusion, that all activities, even those remotely connected with these companies are necessarily commercial. . . . Accordingly, we must look to the specific activities in which the defendants engage.”

The relationship between the defendants’ specific activities is more symbiotic than remote.

After the OPEC nations assumed control of the concessions through nationalization and participation agreements, a distinction emerged between “equity” oil and “participation” oil. Equity oil refers to the oil produced subject to the former concession agreements. OPEC nation revenues from this oil were derived through taxation and royalties. With participation oil, the nation receives a certain share of the oil produced, the amount depending on the participation percentage. This oil is in turn brought back by the private oil companies from the state-owned compa-

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186. For a description of the varying methods of achieving effective control through different types of participation agreements and nationalization, see Zakariya, supra note 184, at 547-48, 568-73.
Professor John Blair described the change in status as follows:

Since the [oil companies] purchase this oil at "buy back" prices, payment cannot be regarded as taxes and is therefore only a business expense, worth 50¢ tax dollar. With the passage of time, the OPEC countries increased their ownership interest, resulting in a declining proportion of "equity" oil and an increasing proportion of "participation" oil until most of the OPEC countries have secured (or will shortly obtain) full ownership.188

The OPEC court attached much weight to the dependence of OPEC nations on the income derived from oil sales.189 The court believed that this reliance supported its characterization of the defendants' activities as governmental, since raising revenue is a traditional act of sovereignty. While price coordination among OPEC nations increases the revenues for the state coffers,190 this is merely the purpose of the activity. The Act expressly rejects purpose as a test.191

The proprietary interest each OPEC nation has in its wholly or majority owned oil company is realized only through commercial transactions,192 and the fixing of sales terms for the oil extracting companies is an integral part of these commercial transactions. The relationship between the collective agreement concerning the "terms of removal" and the proprietary interest in the extracting companies is like the establishment of corporate policy and objectives by a board of directors. The collective agreement by OPEC

188. Id.
189. The court-appointed expert, Dr. Morris Adelman, explained that "[t]he oil revenues are the great bulk of governmental revenues. Indeed for the OPEC nations supplying most of the oil, the oil revenues are the great bulk of the whole national product." 477 F. Supp. at 568 (quoting testimony of Dr. Morris Adelman, court-appointed expert). The court did not conceal its reliance on its own appointed experts. After comparing the curriculum vitae of plaintiff's experts with the court's own appointed experts, the court stated, "This comparison confirms the wisdom of the court's complete reliance upon its own appointed experts as contrasted with its skeptical consideration of plaintiff's experts." Id. at 566 n.12.

In 1978 Dr. Adelman wrote an article in which he maintained that the OPEC price increases have been made with caution and offered a description of the role of the cartel: "To a first approximation we can think of the oil nations as a single seller." Adelman, International Oil, 18 NAT. RESOURCES J. 725, 726 (1978).

190. See J. BLAIR, supra note 154, at 280-86.
192. See text accompanying notes 185-188 supra.
members is made to ensure pricing coordination and the successful return for the individual members’ sales operations.\(^{193}\)

The court dismissed the changes in the OPEC nations’ method of acquiring revenues.

Prior to any proprietary interest in any oil extracting company, each defendant nation set the terms of the withdrawal of its resources through mediums of taxation and royalties. Thus, the defendants were engaging in this governmental conduct setting the terms for crude production long before they obtained any ownership in any production companies. It necessarily follows that these activities are engaged in by virtue of each defendant’s status as a sovereign—because these activities preceded any proprietary interest. Therefore, the essential nature of the activity is governmental.\(^{194}\)

The above argument assumes that the OPEC nations’ role as regulators of the oil companies is necessarily the same after the OPEC countries replaced the private producers with state-controlled companies. The shift by the oil nations from regulators to owners and operators of profitmaking companies changed the nature of the activity.\(^{195}\) As both the language of the statute and the House Report make clear, it is the nature of the activity that is the relevant inquiry. Therefore, the changes in the means of raising revenue are not irrelevant but dispositive. The OPEC nations’ decision to acquire proprietary control over the trading and production aspects of the business they previously regulated and taxed changed the nature of the nations’ activity. It ceased to be the governmental functions of regulation and taxation, and became instead the commercial activity of production and trade. While both raise revenue, that fact goes to the activity’s purpose.

OPEC price fixing cannot be severed from the stark reality that the role private oil companies once played in producing and selling crude oil is now being filled by the host countries.\(^{196}\) The

\(^{193}\) See J. Blair, supra note 154, at 280-86.

\(^{194}\) 477 F. Supp. at 568 n.14 (emphasis in original).

\(^{195}\) See Yamani, supra note 184, at 396; text accompanying notes 185-188 supra.

\(^{196}\) As of 1976, the participation in the oil companies by OPEC members through either nationalization or agreement stood as follows: Saudi Arabia 60%, Iran 100%, Iraq 100%, Kuwait 60% in some countries and 100% in the Gulf and British Petroleum Concession, Abu Dhabi 60%, Qatur 60%, Libya 51% or 100% depending on the concession, Algeria 100%, Nigeria 55%, Gabon 23%, and Indonesia 100%. Johnson & Messick, Vertical Divestiture of U.S. Oil Firms: The Impact on the World Oil Market, 8 LAW & POL’Y INT’L BUS. 963, 967 n.20 (1976).
relationship between these nations’ proprietary interest and the commercial nature of collectively fixing the price for crude oil is made plain in the following statement by the former chief legal adviser to OPEC:

The drive for state participation in existing petroleum concessions that became a reality in the early seventies has continued unabated, gathered momentum, and lately assumed wider dimensions, culminating on occasion in complete national control. As a result, the role of the international oil companies, which was that of an “autocrat” under the traditional concessions and subsequently was transformed to that of a “partner” under state participation, has finally been reduced to the more modest and realistic one of a mere provider of technical services and of a long-term buyer of crude oil.197

The host nations are now the sellers of oil and the oil companies are the purchasers. The fixing of prices for oil relates to an activity “traditionally carried on for profit” by private industry and necessitates the collective agreement of OPEC nations. The setting of the terms of removal is both a function and a necessity of maintaining a state-controlled oil industry. The price-fixing activities of the defendants should have been considered in this context and thus characterized as commercial under the FSIA.

Fr omest States as Persons Under American Antitrust Laws

The court also stated that foreign states are not persons within the meaning of the American antitrust laws.198 This is clearly dicta given the court’s determination that it lacked subject matter jurisdiction under the FSIA. Its resolution, however, involves many of the same questions addressed here and poses a potential bar to the maintenance of an antitrust suit against OPEC nations.

The Supreme Court has held in Pfizer, Inc. v. India199 that foreign sovereigns are “persons” under the antitrust laws if they appear as plaintiffs, but in other cases has held that they are not persons when they are sued as defendants in antitrust actions.200

197. See Zakariya, supra note 184, at 568.
198. 477 F. Supp. at 570-72.
200. The Supreme Court has never directly addressed the issue of whether foreign sovereigns are persons under the antitrust laws, but it has held that domestic sovereigns are not persons in this context. Parker v. Brown, 317 U.S. 341, 351-52 (1943). It was on this case that the district court in OPEC relied. 477 F. Supp. at 570. Parker itself, however, indicates that immunity does not extend to activities in which
Since it is a common rule of statutory construction that words in a statute are to be given a consistent interpretation in varying contexts,\textsuperscript{201} the refusal to characterize foreign states as persons when they are defendants must be based on nonstatutory-construction grounds. In \textit{Pfizer}, the Supreme Court distinguished those cases holding that sovereigns are not persons when they appear as defendants in an antitrust suit on the ground that there is no "interference in sensitive matters of foreign policy" when the sovereign appears as a plaintiff.\textsuperscript{202} Since the FSIA mandates that if a foreign state is not entitled to immunity under the Act, then it "shall be liable in the same manner and the same extent as a private individual under like circumstances,"\textsuperscript{203} a finding of commercial activity is sufficient to render a foreign sovereign a person under the antitrust laws.

**CONCLUSION**

The district court in \textit{IAM v. OPEC} should have maintained jurisdiction over the OPEC nations given the clear dictates of the FSIA and the commercial nature of the defendants' activities. Judge Hauk acknowledges in his opinion that his statutory construction was shaped in part by the enormous implications that maintaining jurisdiction would have on American foreign policy.\textsuperscript{204} It is clear that the district court's decision does not square with

\textsuperscript{201} The word "person" has been subject to this rule of construction in civil rights litigation for purposes of resolving municipal-immunity questions. City of Kenosha v. Bruno, 412 U.S. 507, 513 (1972). Several circuit courts have similarly maintained that a word or phrase used in different parts of the same statute should be given the same meaning throughout. \textit{E.g.}, United States v. Nunez, 573 F.2d 769 (2d Cir.), \textit{cert. denied}, 436 U.S. 929 (1978); \textit{Hotel Equities Corp. v. C.I.R.}, 546 F.2d 725, 728 (7th Cir. 1976); \textit{Patagonia Corp. v. Board of Governors}, 517 F.2d 803, 811, 813 (9th Cir. 1975); C.I.R. v. Ridgeway's Estate, 291 F.2d 257, 259 (3d Cir. 1961).

\textsuperscript{202} \textit{434 U.S. at 319}. The leading circuit court case dealing with the question of a sovereign state's status as a defendant under the antitrust laws, \textit{Hunt v. Mobil Oil Co.}, 550 F.2d 68, 78 n.14 (2d Cir.), \textit{cert. denied}, 434 U.S. 984 (1977), was based largely on act-of-state grounds. \textit{Accord, Interamerican Refining Corp. v. Texaco Maracaibo, Inc.}, 307 F. Supp. 1291 (D. Del. 1970). The last case has been called into serious question by \textit{Outboard Marine Corp. v. Pezetel}, 461 F. Supp. 384 (D. Del. 1978), in which the court sustained jurisdiction under the FSIA against a state-owned company engaged in the sale of golf carts. The company was charged with violating the antitrust laws by engaging in price cutting.


\textsuperscript{204} 477 F. Supp. at 567.
either the current realities of crude-oil production in the OPEC nations or the standards established by the FSIA. The reliance on political expediency and diplomatic concerns was part of the decisionmaking process rejected by the FSIA, and the injection of these concerns into questions of sovereign immunity hinders the development of a consistent body of legal precedent defining the still vague term "commercial activity." The decision in IAM v. OPEC indicates that the judiciary is still unwilling to accept the role assigned to it by Congress and the President of deciding sovereign immunity questions solely on the basis of legal principles.205

Part of the reason for this reluctance may be the consequences of accepting that role.

The political implications of asserting jurisdiction are clear. Equally important are the jurisprudential ramifications. The assertion of jurisdiction in this case would have been a significant benchmark in the evolution of sovereign immunity in international law. The enforcement of antitrust laws against a foreign sovereign stretches both the forum and foreign state’s sovereignty beyond traditional bounds when the foreign state’s sole contact with the forum is that its commercial activity had effects there. The forum state has extended its public policy determinations about the proper organization of economic activity beyond the state’s territorial limits. This violates the one traditional limitation implicit in the definition of sovereignty established by the current world order of independent states: while each nation is sovereign within its borders,206 each lacks authority outside those territorial limits.207 As-


206. See sources note 21 supra.

207. See I. BROWNLIE, supra note 1, at 299-301; H. KELSEN, supra note 2, at 307-12; I L. OPPENHEIM, supra note 2, § 70; I J. VERZIJL, supra note 2, 261-62.
serting jurisdiction also distorts the sovereignty of the state charged with the antitrust violation since that nation’s authority within its territorial borders has been diminished.

The assertion of jurisdiction is only the manifestation and instrument of the diminution, it is not the cause. Every state has had the absoluteness of its sovereignty reduced by the growing interdependence and interaction of the world community. The analytic problems come from the extension of the forum state’s sovereignty through the judicial assertion of the state’s public policy decisions. An equally plausible solution to the growing interdependence of the world community would be to force the forum state to live with the effects of the foreign state’s activities as a necessary byproduct of world trade. Traditional notions of sovereignty provide no analytic tools for choosing between the competing claims of the two states.

One answer is to differentiate between sovereign and nonsovereign activity. This in large part is the rationale behind restrictive immunity’s distinction between commercial and governmental acts. Since the latter are presumably nonsovereign activity, the state’s sovereignty is not diminished if it is subject to jurisdiction. This theory has an allure in an age when states are increasingly gaining direct control through their commercial activity over persons living outside the state’s territorial boundaries. American notions of justice demand that those decisions of the state that affect people’s lives be made publicly accountable through judicial scrutiny.

The analytic conundrum remains, Why should the forum state’s notions of justice and optimal economic organization prevail? The most practical solution is to make room in the Act for courts to defer to the political branches of government on political question grounds if the case satisfies the last two Baker v. Carr criteria, namely, “an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

These two criteria would strike the proper balance between the judiciary, the executive, and Congress. Both crite-


209. The central purpose of the political question doctrine is to maintain the proper balance between the three branches of government. See text accompanying notes 123-128 supra.
ria require the political branches to make a firm commitment to
the foreign policy question at stake: The first criterion refers to
"unusual need" and the second to embarrassment, which could re-
ally only come after the firm commitment suggested above. There-
fore, while the locus of decisionmaking would be in the judiciary,
the President or Congress could force the judiciary's hand by con-
tinued, adamant pronouncements on the foreign policy questions at
issue. Resort to the other Baker criteria would place too much em-
phasis on executive or congressional action and would under-
mine the judiciary's role in deciding sovereign immunity questions.

The most just resolution is to create an independent body oflaw governing the conduct of all nations, yet finding its specific
source in the laws of none. The creation of this new interna-
tional law would represent the breakdown of independent states as
the sole source of sovereignty. The return to a unified world order,
advocated by a number of international law scholars and oth-
ers, exists only in the distant future.

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210. See text accompanying notes 129-144 supra.
211. This is similar to Professor Trautman's proposed multistate solution to do-
   mestic choice-of-law problems. See Trautman, The Relation Between American
   Choice of Law and Federal Common Law, LAW & CONTEMP. PROB., Spring 1977,
at 105, 117-19.
212. See, e.g., R. Falk, A STUDY OF FUTURE WORLDS (1975); M. McDougal,
   H. Lasswell & Lung-Chu Chen, HUMAN RIGHTS AND WORLD PUBLIC ORDER
   (1980); Jessup, supra note 62, at 171-72; Lane, supra note 4.
213. See, e.g., W. Willkie, ONE WORLD (1943).