

COMMENTS

OPEC'S STATUS UNDER U.S. ANTITRUST LAW: AN APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

I. INTRODUCTION

On December 28, 1978, a private antitrust suit¹ was instituted in Los Angeles against the Organization of Petroleum Exporting Countries (OPEC) and its thirteen member states.² The plaintiff, the International Association of Machinists and Aerospace Workers (IAM), alleged through their complaint that OPEC's price-fixing activities in the setting of crude oil prices constituted violations of U.S. antitrust law.³ The plaintiff alleged causes of action under the Sherman Act⁴ and the Wilson Tariff Act⁵ and asserted that such claims were cogniza-

1. *International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1978). The city of Cleveland, Ohio temporarily was joined in the suit as a plaintiff. No. 79-02754 (C.D. Cal., filed July 20, 1979).

2. The OPEC members are: The Democratic and Popular Republic of Algeria (Algeria); The Republic of Ecuador (Ecuador); The Gabonese Republic (Gabon); Republic of Indonesia (Indonesia); Islamic Republic of Iran (Iran); Republic of Iraq (Iraq); State of Kuwait (Kuwait); Libyan Arab Republic (Libya); Federal Republic of Nigeria (Nigeria); State of Qatar (Qatar); Kingdom of Saudi Arabia (Saudi Arabia); State of United Arab Emirates (U.A.E.); and the Republic of Venezuela (Venezuela). Subsequent use of the term "OPEC" in the text is intended to refer both to the organizational body as well as the thirteen sovereign countries which compose its membership. Any reference to the Organization as a separate entity will be so stated.

3. Plaintiff's First Amended Complaint at 17. The International Association of Machinists and Aerospace Workers is a non-profit association having over 900,000 members who are employed by the basic manufacturing, transport, and commercial industries in the United States.

4. 15 U.S.C. §§ 1-7 (1976). Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

5. 15 U.S.C. §§ 8-11 (1976). Section 8 states:

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy, illegal, and void when the same is made by and between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter.

The plaintiff does not expressly rely on the Wilson Tariff Act in its complaint but does so in its Response to Order to Show Cause at 47-48.

ble against OPEC by virtue of the Foreign Sovereign Immunities Act of 1976.⁶ This Act creates exceptions to the general rule of law allowing foreign states immunity from the jurisdiction of U.S. courts.⁷ Seeking both injunctive relief and treble damages under the Clayton Act,⁸ the plaintiff contended that such remedies are applicable against OPEC and that the Foreign Sovereign Immunities Act, as well as existing case law, provides a valid basis for the enforcement of any judgment rendered against the international cartel.⁹

On August 20, 1979, a hearing for a preliminary injunction to enjoin future OPEC price-fixing was begun in this unique lawsuit.¹⁰ The defendants made no appearance before the court.¹¹ United States District Judge A. Andrew Hauk ruled, after a four day hearing in which expert testimony was presented and plaintiff's arguments heard, that U.S. courts lacked jurisdiction over OPEC member states.¹² Invoking

6. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (codified at 28 U.S.C.A. §§ 1330, 1332, 1391, 1441, 1602-1611 (West Supp. 1981)).

7. *Id.* § 1605.

8. Section 4 of the Clayton 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, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976). Section 16 of the Clayton Act 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, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.

15 U.S.C. § 26 (1976).

9. See Plaintiff International Association of Machinists' Response to Order to Show Cause at 54-56, 85-95. Refer to notes 223-32 *infra* and text accompanying.

10. The evidentiary hearing on the plaintiff's motion for preliminary injunction was consolidated with the trial on the final injunction under FED. R. Crv. P. 65. See generally Dallas Morning News, Aug. 24, 1979, at 7A, col. 1; Houston Post, Aug. 24, 1979, at 1, col. 1.

11. Since OPEC had made no appearance, an evidentiary hearing on plaintiff's motion for default judgment, as required by the Foreign Sovereign Immunities Act, was consolidated with the injunction hearing. That part of the Act provides that "no judgment by default shall be entered by the court . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C.A. § 1608(e) (West Supp. 1981).

12. 477 F. Supp. at 569. In response to Judge Hauk's Order to Show Cause, which solicited factual and legal assistance on the issues involved, 11 briefs were submitted for the evidentiary hearing. Among those were *amicus curiae* briefs urging the granting of the injunction filed by the Washington Legal Foundation, U.S. Representative Jim Leach, Public Advocates, Inc., American G.I. Forum, Gulf and Western Industries, Inc., the Attorney General's Office of Connecticut, and a joint memorandum of the Attorneys General of 17 states. *Amicus curiae* briefs urging dismissal were filed by the Indonesia-U.S. Business Committee of the Indonesia Chamber of Commerce and Industry, and by Concerned Black Americans in Support of Africa and the Middle East.

At the hearing the plaintiff presented the expert testimony of Arnold E. Safer, Dr. James R. Kurth, and Dr. Stanley J. Foster. Judge Hauk, dissatisfied with the expertise and proposed testimony of these experts, appointed as the court's own experts, Dr. M. A. Adel-

language indicative of the traditional legal concepts of sovereign immunity and the act of state doctrine,¹³ Judge Hauk commented during the injunction hearing that the price-fixing activities of OPEC "are sovereign agreements to carry out sovereign acts to stabilize prices for their own sovereign benefit."¹⁴ Clearly evident in his decision to dismiss the suit was the belief that judicial resolution of the issues presented would interfere with the administration of foreign affairs which properly lie with the executive branch.¹⁵ In addition to his finding of lack of jurisdiction, Judge Hauk cited several alternative grounds for his dismissal.¹⁶ Judge Hauk's opinion was recently affirmed by the Ninth Circuit Court of Appeals.¹⁷

A. *The Issues Presented*

This comment evaluates the viability of such a private antitrust action against the OPEC cartel. Although reference will be made to the IAM fact situation, this comment is intended to present the primary obstacles facing any private antitrust action against OPEC through an examination of the following issues:

1. Can subject-matter jurisdiction and *in personam* jurisdiction be established over OPEC under the Foreign Sovereign Immunities Act of 1976?
2. What effect, if any, do the traditional doctrines of sovereign immunity and act of state, as developed through case law, have upon such an application of the Foreign Sovereign Immunities Act?
3. Can a valid claim be established under U.S. antitrust law by an indirect purchaser of a price-fixed commodity produced by a foreign state?

man and Dr. Philip K. Verleger, Jr., each of whom possessed expertise in world and domestic petroleum economics. See 477 F. Supp. at 566.

13. Refer to notes 41-93 *infra* and text accompanying.

14. Dallas Morning News, Aug. 24, 1979, at 7A, col. 1.

15. 477 F. Supp. at 575. See also Houston Post, Aug. 23, 1979, at 2B, col. 1. Judge Hauk's apprehensions of judicial interference with foreign relations are echoed throughout the case law dealing with foreign states before United States courts. Refer to notes 46-52 & 80 *infra* and text accompanying.

16. These grounds composed the written findings of fact and conclusions of law required by FED. R. Crv. P. 52(a). Judge Hauk ruled that: 1) subject-matter jurisdiction under the Foreign Sovereign Immunities Act was lacking (see notes 115-18 *infra* and text accompanying); 2) a foreign nation cannot be an antitrust defendant (see notes 177-80 *infra* and text accompanying); 3) the plaintiff IAM was not entitled, as an indirect purchaser, to recover damages under the Sherman Act (see note 201 *infra* and text accompanying); 4) the plaintiff had failed to establish the right to injunctive relief (see notes 246-50 *infra* and text accompanying) and; 5) the plaintiff had failed to show that it was entitled to a default judgment (see note 11 *supra*).

17. An order granting an expedited appeal was entered on May 12, 1980. Oral arguments were heard before the Ninth Circuit on November 5, 1980. Opinion rendered July 6, 1981. IAM v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

4. If such a claim could be established, what form of relief could be properly afforded to a private party plaintiff in light of the defendant's foreign state status?

Since the issues presented will be examined in the context of applicability to OPEC, it is necessary to divert our attention briefly to an analysis of the organization and present status of the oil cartel. We now examine the history and purpose of OPEC with a view to its amenability to United States antitrust law.¹⁸

B. A General Overview of OPEC

OPEC was created on September 14, 1960, by the countries of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela.¹⁹ Their organizational purpose was to effect concerted action to restore price levels and prevent further price reductions for oil produced within their boundaries²⁰ by the major oil companies.²¹ The posted price for oil in the Persian Gulf was \$1.80 per barrel in 1960; and in the first ten years of OPEC's existence, during which the remaining current members joined the organization,²² the cartel only succeeded in obtaining a price increase to \$2.30 per barrel.²³ In February of 1971 the Tehran Agreement, involving six of the OPEC states, was negotiated and a 43% price increase in the posted price of oil was obtained.²⁴ This agreement marked the first significant victory for OPEC and signaled a resulting decline in the ability of the oil companies to freely manipulate pricing

18. It must be noted that a detailed history and discussion of OPEC and its impact is beyond the scope of this comment. Sources helpful to such an inquiry, however, include: F. ABOLFATHI, G. KEYMON, M. HAYES, L. HAZELWOOD, & R. CRAIN, *THE OPEC MARKET TO 1985* (1977); THE BROOKINGS INSTITUTION, *HIGHER OIL PRICES AND THE WORLD ECONOMY* (1975); CONGRESSIONAL QUARTERLY, *CONTINUING ENERGY CRISIS IN AMERICA* (1975) [hereinafter cited as CONG. QUARTERLY]; A. EZZATI, *WORLD ENERGY MARKETS AND OPEC STABILITY* (1978); C. ISSAWI & M. YEGANEH, *THE ECONOMICS OF MIDDLE EASTERN OIL* (1977); S. KLEBANOFF, *MIDDLE EAST OIL AND U.S. FOREIGN POLICY* (1974); G. LENCZOWSKI, *OIL AND STATE IN THE MIDDLE EAST* (1960); T. MORAN, *OIL PRICES AND THE FUTURE OF OPEC* (1978); ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES, *ANNUAL REVIEW AND RECORD* (1970-1978); J. PAUST & A. BLAUSTEIN, *THE ARAB OIL WEAPON* (1977) [hereinafter cited as PAUST & BLAUSTEIN]; F. ROUHANI, *A HISTORY OF O.P.E.C. 77* (1971) [hereinafter cited as ROUHANI]; D. RUSTOW & J. MUGNO, *OPEC SUCCESS AND PROSPECTS* (1976) [hereinafter cited as RUSTOW & MUGNO]; B. SHWADRAN, *THE MIDDLE EAST, OIL AND THE GREAT POWERS* (1974); F. WYANT, *THE UNITED STATES, OPEC, AND MULTINATIONAL OIL* (1977) [hereinafter cited as WYANT].

19. ROUHANI, *supra* note 18, at 77.

20. *Id.*

21. The major oil companies are: Exxon, Royal Dutch Shell, Texaco, Gulf, Mobil, British Petroleum, and Standard Oil of California. See A. SAMPSON, *THE SEVEN SISTERS* (1975).

22. Qatar joined OPEC in 1961, Indonesia and Libya in 1962, United Arab Emirates in 1967, Algeria in 1969, Nigeria in 1971, Ecuador and Gabon in 1973.

23. PAUST & BLAUSTEIN, *supra* note 18, at 182.

24. CONG. QUARTERLY, *supra* note 18, at 29.

mechanisms in the OPEC states. The Tripoli Agreement of April 1971, involving Libya, and the East Mediterranean Agreement in June 1971, involving Iraq, marked further victories for OPEC nations in the securing of increases in basic posted prices for oil.²⁵ By resolution that same year, OPEC called for effective participation by its members in the assets of the oil companies.²⁶ In 1973, the year of the Arab embargo, the per barrel price of oil was raised over 400% in a series of rapid price increases.²⁷ Since that time there have been subsequent yearly increases resulting in a ceiling price in the summer of 1979 of \$23.50 per barrel.²⁸ Several OPEC countries, however, exceeded this price ceiling in October 1979.²⁹ Those increases prompted further action by the remaining OPEC countries, culminating in a 1980 ceiling price of \$41.00.³⁰ Joint ownership in the producing companies, referred to as participation, has increased with equal speed and OPEC has stated that its ultimate goal is to have "complete control over the oil industry in their sovereign territories."³¹

OPEC functions as an organizational conduit through which the thirteen member states decide their national oil policies in an attempt to increase their influence through joint cooperation. As a result, OPEC as a separate entity is almost entirely indistinguishable from the member countries composing it. The organization itself has no international juridical personality³² which is recognized by this country, a factor considered by Judge Hauk in his early dismissal of the organization as a defendant while at the same time retaining the thirteen sovereign members.³³ For that reason, the price-fixing activities of OPEC must

25. *Id.*

26. WYANT, *supra* note 18, at 75.

27. PAUST & BLAUSTEIN, *supra* note 18, at 183.

28. Houston Post, October 16, 1979, at 1A, col. 1. This ceiling price was set at OPEC's June, 1979 meeting in Vienna.

29. Libya raised its crude oil price 12% to approximately \$26 per barrel, and Iran raised its by 6.8% to bring it to the ceiling level. *Id.* Iraq posted a 10% increase later that same week but remained below the ceiling price. Houston Post, October 19, 1979, at 1A, col. 2.

30. *African Price Rises Complicated by Varying Premiums*, Petroleum Intelligence Weekly, Jan. 5, 1981, at 1.

31. ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES, ANNUAL REVIEW AND RECORD 11 (1976). Examples of OPEC nationally owned oil companies are: Aramco (Saudi Arabia); Pertamina (Indonesia); Sonatrach (Algeria); National Iranian Oil Company (Iran); Iraq National Oil Company (Iraq); Kuwait Oil Company (Kuwait); Qatar Petroleum Company (Qatar); Ven-Sun (Venezuela); Cepe & Cautivo (Ecuador); DPC (U.A.E.); and Libya National Oil Corp. (Libya).

32. "The essence of international juridical personality is possession of the quality of subject of international rights and obligations," a quality generally considered belonging only to states. ROUHANI, *supra* note 18, at 129. Although some international organizations, such as the United Nations, possess such a character, Rouhani explains that only two countries outside the membership of OPEC, Austria and Switzerland, have recognized OPEC's juridical personality; they being host countries to the Organization. *Id.* at 130.

33. 477 F. Supp. at 560.

be viewed as price-fixing activities engaged in by each of its members.

There is no dispute that the setting of prices is central to OPEC's cartel arrangement.³⁴ In a conference of OPEC national oil company representatives in October 1966, a proposal for a "joint marketing system" was submitted with the aim of avoiding competition among the respective nations through their national oil companies.³⁵ The well publicized price increases and production controls which the member states have agreed upon in recent years clearly show that the goal of 1966 has been achieved.³⁶ It has been estimated that through the price-fixing and other anti-competitive activities of the OPEC countries, the rest of the world has now paid more than one-half trillion dollars since 1970 to OPEC countries for their petroleum.³⁷ New pricing agreements are in constant contemplation by OPEC and are generally adopted at the regularly scheduled meetings of the cartel.

Against this background evidencing OPEC's open and intended effect on the world petroleum market through price-fixing and control of production, the questions of whether such activity violates U.S. law, and if so, whether a claim upon which relief can be granted can be stated against these international sovereign defendants is examined. We first examine the essential requirement of jurisdiction.

II. JURISDICTION AND JUDICIAL EXAMINATION OF OPEC ACTIVITY

The Foreign Sovereign Immunities Act begins with a presumption of immunity, stating that "a foreign state shall be immune from the jurisdiction of the courts."³⁸ The power to hear claims against foreign states, however, is broadly granted through the enumeration of exceptions to this general presumption.³⁹ These exceptions deal primarily with commercial activities engaged in by the foreign state as opposed to those activities of a purely governmental character. This statutory dichotomy is essentially a codification of what is known as the "restrictive theory" of sovereign immunity.⁴⁰ An analysis of the Foreign Sovereign Immunities Act therefore requires an examination of the evolution of the doctrine of sovereign immunity in order to understand its application within the statute.

34. RUSTOW & MUGNO, *supra* note 18, at 99.

35. F. GHADER, *THE EVOLUTION OF OPEC STRATEGY* 52 (1977).

36. *Id.* at 54.

37. RUSTOW & MUGNO, *supra* note 18, at 91.

38. 28 U.S.C.A. § 1604 (West Supp. 1981).

39. *Id.* § 1605.

40. This was a primary objective of the Foreign Sovereign Immunities Act. *See* H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as HOUSE REPORT].

A. *The Sovereign Immunity Doctrine*

The history of sovereign immunity in the United States dates back to 1812 when the Supreme Court held in *The Schooner Exchange v. McFadden*⁴¹ that a foreign warship located in a U.S. port was exempt from the jurisdiction of U.S. courts. Referring to this exemption as an "implied promise,"⁴² Chief Justice John Marshall first articulated the notion of preserving comity between nations by extending immunity from suit to a sovereign and the property representing it. This opinion has been viewed as expressing the "absolute theory" of sovereign immunity under which a state is immune from *all* causes of action by simple virtue of its sovereign character regardless of whether the nature of the sovereign's activities were governmental or commercial.⁴³ The most important extension of the absolute theory is found in the case of *Berrizi Bros. v. Steamship Pesaro*⁴⁴ wherein the U.S. Supreme Court extended the absolute immunity doctrine enunciated in the *Schooner Exchange* opinion to include *merchant* ships of foreign nations. The Court stated that such merchant ships were "public ships in the same sense warships are."⁴⁵ In short, even though the sovereign was acting commercially rather than in a governmental capacity it still enjoyed absolute immunity for its conduct.

Gradually, the decision of whether to extend sovereign immunity became one in which the executive branch played the dominant role.⁴⁶ In order to avoid embarrassment to the executive's conduct of foreign affairs, the courts placed substantial reliance upon the State Department's determination of immunity.⁴⁷ The decision to extend sovereign

41. 11 U.S. (7 Cranch) 116 (1812).

42. *Id.* at 147.

43. *See, e.g.*, *Berrizi Bros. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926); *The Maipo*, 259 F. 367 (D.C. Cir. 1919); *The Carlo Poma*, 259 F. 369, 370 (2d Cir. 1919). *See generally* E. ALLEN, *THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS* 3-14 (1933); J. BRIERLY, *LAW OF NATIONS* 244 (6th ed. 1963); Fine, *Sovereign Immunity and the Nation State Cartel*, 51 L.A.B.J. 283, 289 (1975) [hereinafter cited as Fine]; Reeves, *The Foreign Sovereign Before United States Courts*, 38 *FORDHAM L. REV.* 455 (1970); Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 *TEX. L. REV.* 1, 8 (1976) [hereinafter cited as Timberg].

44. 271 U.S. 562 (1926).

45. *Id.* at 574.

46. *Mexico v. Hoffman*, 324 U.S. 30, 35 (1944); *Ex parte Peru*, 318 U.S. 578, 587 (1942); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1917); *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 358 (2d Cir. 1964).

47. *Jet Line Servs., Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1169 (D. Md. 1978); 324 U.S. at 35. For a general background in the constitutional foundation of the executive's power to conduct foreign affairs see E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 184, 416-18 n.1 (4th ed. 1957); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 47, 86 (1973); Berger, *The Presidential Monopoly of Foreign Relations*, 71 *MICH. L. REV.* 1 (1972); Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense*, 13 *VA. J. INT'L L.* 463 (1973).

immunity thus became dependent on these executive "suggestions" and consequently centered less on notions of comity and the law of nations.⁴⁸ This trend of executive suggestion, although practiced even in the case of *Schooner Exchange*,⁴⁹ actually reached its apogee in the cases of *Ex parte Peru*,⁵⁰ *Mexico v. Hoffman*,⁵¹ and *Compania Espanola de Navegacion Maritima, S. A. v. The Navemar*.⁵² These cases established a doctrine of conclusiveness on the suggestions of immunity made by the State Department.

State Department determinations of immunity had become diplomatically complex as a result of the adoption, in 1952, of the "restrictive theory" of sovereign immunity contained in the now famous Tate letter.⁵³ From that date, the express position of the State Department was to recognize the immunity of the sovereign with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).⁵⁴ Where the acts of the sovereign were of a governmental nature, a suggestion of immunity would follow. Where the sovereign's acts were more properly labeled as commercial, the State Department would refuse to grant any suggestion of immunity, thereby placing the foreign state in the position of having to affirmatively prove its defense of sovereign immunity.⁵⁵ The distinction between what constituted a governmental or commercial activity

48. *Jet Line Servs., Inc.*, 462 F. Supp. at 1169.

49. 11 U.S. (7 Cranch) at 117.

50. 318 U.S. 578 (1942). The Court stated:

When the Secretary [of State] elects . . . to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation in the courts, it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings.

318 U.S. at 587. Even as recently as 1971, some courts are still voicing support for *Ex parte Peru's* approval of the conclusiveness of executive determination. *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971).

51. 324 U.S. 30 (1944). The Court, relying on *Ex parte Peru* stated in dicta:

Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effects upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.

324 U.S. at 35. *Cf.* *Chemical Natural Resources, Inc. v. Venezuela*, 420 Pa. 134, 215 A.2d 864, cert. denied, 385 U.S. 822 (1966) (Musamanno, J., dissenting) (strong expression of judicial hostility to executive determinations of sovereign immunity).

52. 303 U.S. 68 (1938). The Court said "if the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts" to abide by that determination and dismiss the suit. 303 U.S. at 74.

53. 26 DEP'T STATE BULL. 984-85 (1952).

54. *Id.*

55. Sovereign immunity is an affirmative defense which must be specifically pleaded

presented obvious difficulties and resulted in non-uniform decisions in those instances where the courts deferred to executive determinations of sovereign immunity under the restrictive theory.⁵⁶ Two cases involving international antitrust actions particularly demonstrate this confusion: *United States v. Deutsches Kalisyndikat Gesellschaft*⁵⁷ and *In re Investigation of World Arrangements*.⁵⁸ In *Gesellschaft* the court refused to extend immunity to a government-owned potash producer in France.⁵⁹ Immunity was allowed, however, to the Anglo-Iranian Oil Company in the *World Arrangements* case on the grounds that the company was indistinguishable from the British government.⁶⁰ *In re Grand Jury Investigation of the Shipping Industry*⁶¹ did little to clarify this inconsistency, holding that a claim of sovereign immunity by a Philippine national shipping line fell "somewhere in between the *World Arrangements* and the *Gesellschaft* cases."⁶²

The best attempt prior to the passage of the Foreign Sovereign Immunities Act at providing substance to the stated policy of the Tate letter was the case of *Victory Transport v. Comisaria General*.⁶³ The Second Circuit Court of Appeals adopted the purpose of the transaction test and outlined an inclusive categorization of those acts which were political or public and would consequently entitle the sovereign to a valid claim of immunity:⁶⁴

1. Internal administrative acts, such as expulsion of an alien.
2. Legislative acts, such as nationalization.

and proved by the sovereign. *Bradford v. Chase Nat'l Bank*, 24 F. Supp. 28, 36 (S.D.N.Y. 1938). See also House Report, *supra* note 40, at 17.

56. *Jet Line Servs., Inc.*, 462 F. Supp. at 1169. See, e.g., *Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223 (1st Cir. 1974); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *Kingdom of Romania v. Guaranty Trust Co.*, 250 F. 341 (2d Cir.), *cert. denied*, 246 U.S. 663 (1918); *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974); *Pan American Tankers Corp. v. Republic of Vietnam*, 291 F. Supp. 49 (S.D.N.Y. 1968); *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *aff'd*, 17 A.D.2d 927, 233 N.Y.S.2d 1013 (App. Div. 1962).

57. 31 F.2d 199 (S.D.N.Y. 1929).

58. 13 F.R.D. 280 (D.D.C. 1952).

59. The court reasoned that private corporations, in which a government has an interest, are not departments of government. 31 F.2d at 203.

60. The court distinguished *United States v. Deutsches Kalisyndikta Gesellschaft* by saying that there the French government was involved in a commercial venture, divorced from any governmental function, whereas Britain relied upon the Anglo-Iranian Oil Company to maintain a proper supply of oil for its government fleet. 13 F.R.D. at 291.

61. 186 F. Supp. 298 (D.D.C. 1960).

62. *Id.* at 319.

63. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

64. 336 F.2d at 360. The court's language was clear that this list was intended to be exclusive: "We do not think that the restrictive theory adopted by the State Department requires sacrificing the interests of private litigants to international comity in other than these limited categories." *Id.*

3. Acts concerning the armed forces.
4. Acts concerning diplomatic activity.
5. Public loans.

Although the purpose test set forth in *Victory Transport* was generally followed until the passage of the Foreign Sovereign Immunities Act,⁶⁵ it is noteworthy that some courts still deferred to executive determinations of immunity even when a contrary result would have been reached under the *Victory Transport* formula.⁶⁶ This fact once again confirmed the general reluctance of the courts to interfere with the conduct of foreign relations,⁶⁷ even though the State Department, through the Tate letter, had attempted to provide the courts with a method for judicial resolution of these immunity questions.⁶⁸

In summary, the doctrine of sovereign immunity in U.S. law provides for the abdication or relinquishment of jurisdiction by U.S. courts over a foreign state by simple virtue of its status.⁶⁹ The restrictive approach to sovereign immunity, which limits the defense to governmental or public acts of a sovereign, was achieved through judicial evolution and codified in the Foreign Sovereign Immunities Act. This approach, which under the Act makes a sovereign liable for its commercial activities is in accord with the modern practice of nations.⁷⁰ Since OPEC activity could arguably be considered commercial in character, the Act could be construed to be applicable in any suit brought against the cartel. But before examining OPEC's status under the Foreign Sovereign Immunities Act there remains to be evaluated the effect of a related tenet of international law, the act of state doctrine.

B. *The Act of State Doctrine*

The act of state doctrine is not invoked in order to demonstrate lack of jurisdiction as in the case of sovereign immunity. Rather, it serves in effect as an issue-preclusion device which prohibits the courts from examining the validity of acts committed by the foreign state. Although closely related to sovereign immunity in that many similar considerations are raised, such as sovereign independence and comity, the act of state doctrine stands more correctly in a choice-of-law context

65. The Foreign Sovereign Immunities Act adopts an *effects* test. Refer to note 100 *infra* and text accompanying.

66. *See, e.g.*, *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200-01 (2d Cir. 1971).

67. Refer to notes 46-52 *supra* and text accompanying.

68. Refer to notes 53-54 *supra* and text accompanying.

69. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705-06 n.18 (1976).

70. *Id.* at 702 n.15. *See also* 26 DEP'T STATE BULL. 984-85 (1952).

rather than in a jurisdictional one.⁷¹ The 1897 case of *Underhill v. Hernandez*⁷² provides the classic statement of the doctrine:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁷³

In *Underhill* the Supreme Court refused to adjudicate a claim which turned upon the acts of a revolutionary government in Venezuela which had been committed within Venezuela's borders.⁷⁴ Similar later cases firmly entrenched the doctrine in U.S. law.⁷⁵

The act of state doctrine was first dealt with in an antitrust context in the *American Banana* case.⁷⁶ The Supreme Court held that the acts complained of were not within the reach of the Sherman Act as they had been committed outside the United States, and that the act of state doctrine precluded any examination of the Costa Rican officials involved. The Court specifically relied on the principal enunciated in *Underhill* in dismissing the complaint.⁷⁷

The landmark *Sabbatino* case held that the act of state doctrine would be applicable in those cases involving: a) a public act, b) committed by a recognized foreign sovereign power, c) within its own terri-

71. 425 U.S. at 705-06 n.18. Justice Clarke explained the difference in the following terms:

[The act of state doctrine] does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.

Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918). For other discussions of the act of state doctrine, see generally Joelson & Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 INT'L LAW. 617, 631 (1975) [hereinafter cited as Joelson & Griffin]; Timberg, *supra* note 43, at 27; Note, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247, 1255 (1977).

72. 168 U.S. 250 (1897).

73. *Id.* at 252.

74. *Id.* at 254.

75. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). In *Oetjen*, the Court artfully stated: "To permit the validity of the acts of one sovereign state to be reexamined [sic] by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." 246 U.S. at 304.

76. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). Refer to notes 149 & 165 *infra* and text accompanying for further discussion of the *American Banana* case and its modern applicability.

77. 213 U.S. at 356.

tory.⁷⁸ The Supreme Court held that the U.S. Constitution does not require the act of state doctrine, nor does it completely remove the capacity for U.S. courts to review the validity of foreign acts.⁷⁹ Stating that the doctrine does, however, find its constitutional underpinnings in that basic notion of separation of powers, the Court voiced many of the same considerations of non-interference with the executive branch's conduct of foreign affairs that had been articulated with respect to sovereign immunity.⁸⁰

The act of state doctrine also tracked the evolution of sovereign immunity in another important respect when the U.S. Supreme Court in *Alfred Dunhill of London v. Republic of Cuba*⁸¹ held that the act of state doctrine is not available to a foreign sovereign for acts which constitute purely commercial operations. *Dunhill* involved a suit arising out of the Cuban expropriation of certain cigar companies in 1960. The government of Cuba, as an intervenor to the suit, repudiated its obligation to repay certain cigar importers payments which had been made to the government controlled companies. The parallelism with the restrictive theory of sovereign immunity was clearly presented by a plurality of the Court⁸² in reversing the Second Circuit⁸³ through its reliance on sovereign immunity precedents.⁸⁴ In addition, the Court concluded that in the international commercial setting, the right of the private litigant to a court determination of his rights outweighs any resulting injury to foreign policy.⁸⁵ The Court expressly noted that this conclusion follows whether the foreign policy considerations are presented in a sovereign immunity context or in the context of act of state.⁸⁶ The United States as *amicus curiae* in *Dunhill* stated that the

78. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

79. *Id.* at 423.

80. *Id.* at 427-28. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (plurality opinion holding that where the executive branch expressly represents to the Court that application of the act of state doctrine would not advance American foreign policy, that doctrine should not be applied). Refer also to notes 46-52 *supra* and text accompanying.

81. 425 U.S. 682 (1976).

82. Justice White delivered the opinion in which Justice Rehnquist and Chief Justice Burger joined. Justice Stevens, in concurrence, did not join that part of the opinion which held that purely commercial obligations are beyond the act of state doctrine. Justice Powell did not address the commercial issue in his concurrence. Justice Marshall, writing for the dissent, in effect stated that the restrictive theory of sovereign immunity was not a proper statement of the law. *Cf.* The Foreign Sovereign Immunities Act, notes 6 & 40 *supra*, passed after the *Dunhill* decision (clearly codifying the restrictive approach).

83. *Menendez v. Saks & Co.*, 485 F.2d 1355, 1371 (2d Cir. 1973) (holding that the Cuban repudiation of their debt was an act of state), *rev'd sub nom.* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

84. 425 U.S. at 693-96.

85. *Id.* at 705 n.18.

86. *Id.*

adjudication of such commercial claims does not "affront the sovereignty of a foreign nation . . . because the foreign state makes its appearance in the marketplace as a merchant, not as a sovereign."⁸⁷ The brief in *amicus curiae* also cautioned that to allow a foreign state's commercial operations protection under the act of state doctrine would frustrate the development of the restrictive theory of sovereign immunity by "permitting sovereign immunity to re-enter through the back door, under the guise of the act of state doctrine."⁸⁸ This problem was identified in the plurality's opinion, and previous cases had noted, in almost identical language, this obvious flaw in an uneven application of the two doctrines with respect to commercial activity.⁸⁹

Notably, *Dunhill's* plurality decision cannot be construed to overrule the leading act of state decision in *Sabbatino*.⁹⁰ Certain language in *Sabbatino* might even be interpreted as being consistent with a commercial activity exception to the act of state doctrine: "[S]ome aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."⁹¹ The *Sabbatino* Court did note that a greater degree of codification in a particular area of international law would make it more appropriate for the courts to render decisions regarding that area.⁹² This was precisely the goal of the framers of the Foreign Sovereign Immunities Act. Through the codification of the restrictive theory of sovereign immunity and its resulting affect on the act of state doctrine, Congress made it clear that it intended for the judiciary alone

87. Brief for United States as *amicus curiae*, reprinted in 15 INT'L LEGAL MATERIALS 146, 159 (1976). The State Department agreed with this position as set forth by the Solicitor General in the *amicus curiae* brief. Letter from Monroe Leigh, Legal Advisor of the Department of State, to the Solicitor General (Nov. 26, 1975) reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706-11 app. 1 (1976).

88. Brief for United States as *amicus curiae*, reprinted in 15 INT'L LEGAL MATERIALS 146, 163-64 (1976).

89. 425 U.S. at 705. See, e.g., 336 F.2d at 362.

90. The Court directed counsel in *Dunhill* to brief and argue whether the holding in *Sabbatino* should be reconsidered. 425 U.S. at 690 n.5. The Court's decision, in its most narrow form, at best creates only a limited exception to *Sabbatino's* rule of law. 425 U.S. at 706.

91. 376 U.S. at 428. The Ninth Circuit used this language in *Sabbatino* to support its July 1981 decision to uphold the District Court in *International Assoc. of Machinists v. OPEC*. Comparing the application of the act of state doctrine in international matters with the application of the political question doctrine in domestic matters, the Court of Appeals said "[t]he 'touchstone' or 'crucial element' is the potential for interference with our foreign relations." 649 F.2d 1354, 1360 (9th Cir. 1981). The Court discarded the notion of a commercial activity exception to the act of state doctrine and agreed with Judge Hauk's conclusion that OPEC's actions are sovereign allocations of its own natural resources. *Id.* at 1354-55. The Ninth Circuit thus affirmed Judge Hauk's reasoning, upholding the dismissal upon act of state considerations.

92. 376 U.S. at 428.

to resolve future disputes which might touch on these commercial areas of international law.⁹³ Our attention now turns to a detailed survey of the Foreign Sovereign Immunities Act and the case law recently rendered under it.

C. *The Foreign Sovereign Immunities Act of 1976*

The Foreign Sovereign Immunities Act was designed to meet four objectives:⁹⁴

- 1) to codify the restrictive theory of sovereign immunity and to encourage the bringing of actions under that concept,
- 2) to transfer the determination of immunity from the executive branch to the judicial branch,
- 3) to provide a statutory procedure for obtaining *in personam* jurisdiction over a foreign state, and
- 4) to restrict the principle of absolute immunity from execution enjoyed by foreign states following a judgment obtained against it.

The Foreign Sovereign Immunities Act confers original subject-matter jurisdiction to the federal district courts over civil actions instituted against a foreign state.⁹⁵ The Foreign Sovereign Immunities Act provides for *in personam* jurisdiction over the foreign state(s) when compliance is met with regard to the service of process as statutorily outlined.⁹⁶ This method of obtaining *in personam* jurisdiction over foreign states creates what is essentially a long-arm statute within the For-

93. HOUSE REPORT, *supra* note 40, at 7. However, Congress intended to leave the judicially created act of state doctrine intact while codifying the sovereign immunities doctrine in the Foreign Sovereign Immunities Act. See HOUSE REPORT, *supra* note 40, at 20 n.1, "The Committee has found it unnecessary to address the act of state doctrine in this legislation."

94. *Id.* at 7-8.

95. 28 U.S.C.A. § 1330(a) (West Supp. 1981) states in full:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Section 1603(a) of the Act defines a foreign state as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C.A. § 1603(a) (West Supp. 1981).

96. 28 U.S.C.A. § 1330(b) (West Supp. 1981) states: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." Section 1608(a) provides for a four-tiered hierarchy of method of service. First, service must be attempted in accordance with any special arrangement for service between the plaintiff and the foreign state. Where no such arrangement exists, any applicable international convention on service of judicial documents controls. If there likewise exists no such international convention, service may be made by issuing a copy of the summons and complaint, in the applicable foreign language, to be sent through registered mail by the clerk of the court to the head of the foreign state's ministry of foreign affairs. Finally, if service cannot be

ign Sovereign Immunities Act.⁹⁷ As a consequence, the due process requirements of minimum contacts and adequate notice attach to the provisions of the Act.⁹⁸

The Act clearly defines the circumstances under which a foreign state will not be entitled to immunity.⁹⁹ Most pertinent in the context of a suit brought against OPEC is section 1605(a)(2) which states:

A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case—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.¹⁰⁰

Under section 1605(a)(2) provisions, a plaintiff bringing suit against OPEC could maintain, as IAM contends, that OPEC is amenable to suit in United States courts by virtue that its price-fixing activities are a part of the OPEC states' commercial activity and that such acts have a direct effect in the United States through higher oil prices and resulting inflation.¹⁰¹ In order to establish such a theory of jurisdiction over OPEC, a plaintiff must be able to demonstrate to the court that OPEC's activities are commercial and have substantial contacts within the United States sufficient to comport with due process.¹⁰² Secondly, the plaintiff must show that the acts complained of have a direct effect in the United States.¹⁰³

made in 30 days under the above, the summons and complaint may be mailed by the court clerk to the U.S. Secretary of State to be then transmitted through diplomatic channels.

97. Section 1330(b) was patterned after the District of Columbia's long-arm statute, Pub. L. No. 91-358, § 132(a), title 1, 84 Stat. 549. See HOUSE REPORT, *supra* note 40, at 13.

98. See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hansen v. Denckla, 357 U.S. 235 (1953); International Shoe Co. v. Washington, 326 U.S. 310 (1945). For a discussion of IAM's theory of OPEC's minimum contacts in the United States, refer to notes 106-109 *infra* and text accompanying.

99. 28 U.S.C.A. § 1605 (West Supp. 1981).

100. 28 U.S.C.A. § 1605(a)(2) (emphasis added). Cf. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (using similar language).

101. Plaintiff's Brief in Response to Order to Show Cause at 39-46.

102. 28 U.S.C.A. § 1603(e) (West Supp. 1981). Although the burden of proving sovereign immunity rests upon the foreign state, it is assumed here that OPEC, had it appeared in the case, would have presented evidence showing that the acts complained of by the plaintiff were "public acts" entitled to sovereign immunity or non-review under the act of state doctrine. The burden, therefore, would be shifted to the plaintiff to demonstrate that OPEC is not entitled to immunity. HOUSE REPORT, *supra* note 40, at 19.

103. One court has noted that such a direct effects test results in an examination of the underlying cause of action in the preliminary determination of jurisdiction; a blend of substance and procedure necessitated by the Act's specific enumeration of exceptions to juris-

In *Carey v. National Oil Corp.*,¹⁰⁴ which was decided under the Act, the Second Circuit dealt directly with the elements of substantial contacts and direct effect. The suit involved an action by a parent U.S. corporation based upon Libya's failure to deliver oil to the corporation's Bahamian subsidiary. The court held that *in personam* jurisdiction did not exist where there was "no real entering of the marketplace in the United States" by Libya, and that the breach of Libya's obligation to a Bahamian company lacked the "direct effect in the United States" required by section 1605(a)(2).¹⁰⁵ IAM attempts to distinguish the *Carey* decision by arguing that OPEC does have substantial contacts with the United States. Citing such examples as spot transactions between an OPEC country's refinery and a U.S. firm, or long-term agreements where the U.S. firm contracts to purchase OPEC oil for a fixed time period at the price set by OPEC, IAM attempts to demonstrate the existence of direct and close contacts between OPEC and U.S. oil companies.¹⁰⁶ This close relationship, it is asserted, is further indicated by the existence of tax credit systems in some OPEC countries which favor the U.S. oil companies by lowering their tax liability to the United States government.¹⁰⁷ This kinship between U.S. companies and OPEC is best exemplified, IAM urges, by the existence of "Aramco"¹⁰⁸ in Saudi Arabia.

Unquestionably, the activities of OPEC can clearly be shown to have substantial contacts within the United States¹⁰⁹ through the American petroleum companies, a major industry in this country. There must likewise be, however, a showing that these are commercial activities which have a direct effect in the United States. The fact that OPEC pricing agreements have led to higher fuel costs in the United States is beyond dispute and is common knowledge to the U.S. consumer. Further, the tax credit system practiced by Saudi Arabia is estimated to be worth one to two billion dollars a year to certain major U.S. oil companies and consequently has had a direct effect on the abil-

dictional immunity. *Yessenin-Volpin v. Novosti Press Agency, Tass*, 443 F. Supp. 849, 851 (S.D.N.Y. 1978).

104. 592 F.2d 673 (2d Cir. 1979) (per curiam).

105. *Id.* at 676-77.

106. Plaintiff's Brief in Response to Order to Show Cause at 41-44.

107. *Id.* at 44.

108. The Arabian American Oil Company. At the time IAM filed its suit against OPEC 40% of the ownership in Aramco was by the four major American oil producers: Exxon, Mobil, Texaco and Standard Oil of California. The Saudi Arabian government, however, is currently in the process of a gradual and complete takeover of Aramco.

109. This conclusion rests in part upon the case of *Outboard Marine v. Pezetel*, 461 F. Supp. 384, 394 (D. Del. 1978), in which the minimum contacts sufficient under the Foreign Sovereign Immunities Act to subject a Polish company to *in personam* jurisdiction were found by virtue of its contracts and sales of golf carts in Delaware. See note 127 *infra* and text accompanying.

ity of the United States to tax those earnings.¹¹⁰ As a result, assuming that the court first finds subject-matter jurisdiction under the Act by characterizing OPEC activity as commercial and thus not entitled to immunity, a court could then properly find that OPEC is subject to *in personam* jurisdiction by virtue of the direct effect, substantial contact test set forth in the Foreign Sovereign Immunities Act.¹¹¹ Such an application would be consistent with the legislative history of the Act which states that the Act is intended to encourage the bringing of actions against foreign states for their commercial activities.¹¹² This view would be in accord, as was intended by the framers, with the modern theory of restrictive immunity.¹¹³

The essential assumption, of course, of the above theory of jurisdiction over OPEC under the Foreign Sovereign Immunities Act, is that OPEC's price-fixing falls within the meaning of "commercial activity" as that term is used in section 1605.¹¹⁴ Judge Hauk's ruling in the IAM case clearly rejects the validity of this necessary assumption. His dismissal was premised on the conclusion that OPEC's actions are not commercial activity as that term is intended by the Act and that as a result, subject-matter jurisdiction is lacking in a suit against the cartel.¹¹⁵ He reasoned that price-fixing is not the heart of OPEC's activities but rather that the true foundation is the "ability and willingness to control production of crude oil."¹¹⁶ Since the *nature* of the activity is "the establishment of the terms and conditions for the removal of a prime natural resource" by a sovereign state, Judge Hauk concluded it is governmental in nature, not commercial.¹¹⁷ This narrow construction of the definition of "commercial activity" takes OPEC out of the

110. Plaintiff's Brief in Response to Order to Show Cause at 44.

111. Since Judge Hauk felt that OPEC actions were not "commercial," he never reached the substantial contacts-direct effect issue. 477 F. Supp. at 569.

112. HOUSE REPORT, *supra* note 40, at 13.

113. Refer to note 70 *supra* and text accompanying.

114. 28 U.S.C.A. § 1603(d) (West Supp. 1981) defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." This definition of "regular course of commercial conduct" was intended to include the carrying on of such commercial operations as an oil company. HOUSE REPORT, *supra* note 40, at 16. *Cf.* 477 F. Supp. at 568 n.14. (Judge Hauk interpreted the language of the legislative history to encompass only those circumstances in which the government has a *proprietary* interest in the commercial activity, and not where a *governmental* sovereign interest precedes the nation's status as a proprietor. Since the OPEC nations engaged in the governmental conduct of setting terms for crude oil production long before they obtained any ownership in the producing companies, Judge Hauk concluded that OPEC's control of these oil companies falls within the latter category).

115. 477 F. Supp. at 569.

116. *Id.* at 566.

117. *Id.* at 567.

provisions of section 1605 and consequently destroys subject-matter jurisdiction by giving OPEC a valid claim of sovereign immunity.¹¹⁸ Even assuming Judge Hauk had chosen to characterize OPEC's actions as "commercial activity," which he clearly could have done by a less narrow reading of the definition of that term, he still would have been able to reach the same result of dismissal by way of the act of state doctrine. In fact, the reasoning used by Judge Hauk in the jurisdictional context of sovereign immunity can be viewed as a *sub silentio* affirmation of traditional act of state theory.¹¹⁹ For example, Judge Hauk commented that he believed that the price-fixing activities of OPEC were essentially *public acts* committed by each sovereign nation in order to preserve their respective natural resources and consequently are not subject to review by U.S. courts.¹²⁰ This almost irrefutable position of characterizing OPEC activity as a public act poses the greatest threat in terms of its factual and legal validity to the present or any future antitrust action against OPEC. OPEC had much earlier indicated that the fixing of oil prices and its marketing of oil is inextricably tied to the goals of conserving its natural resources and developing its members' economies.¹²¹ OPEC could also cite a recent United Nations resolution which reaffirms "the inalienable rights of States to permanent sovereignty over all their natural resources"¹²² and which supports each State's sovereign determination of charges for those resources¹²³ as evidence that the pricing of their exported oil is, among the community of nations, considered a sovereign and public act.¹²⁴ The national-

118. Since jurisdiction could not be based under the commercial activities exceptions of § 1605, a claim "to which the foreign state is not entitled to immunity" was not made out under § 1330(a). Refer to note 95 *supra* and text accompanying.

119. This conclusion follows since Judge Hauk felt that OPEC's actions were: 1) public acts, 2) committed by sovereigns, 3) within their own territories, (the three requisite elements mentioned in *Sabbatino* for invocation of the act of state doctrine). See also, the act of state argument presented in the *amicus curiae* brief of the Indonesia-U.S. Business Committee of the Indonesia Chamber of Commerce and Industry at 79-88.

120. Dallas Morning News, Aug. 24, 1979, at 7A, col. 1.

121. Organization of Petroleum Exporting Countries: Declaration Concerning the International Economic Crisis, March 26, 1975, reprinted in 14 INT'L LEGAL MATERIALS 566 (1975). Judge Hauk agreed with this premise. 477 F. Supp. at 568. See ROUHANI, *supra* note 18, at 109-20, supporting this position.

122. G.A. Res. 3171, 28(1) U.N. GAOR 30, U.N. Doc. A/9030 (1973), reprinted in 13 INT'L LEGAL MATERIALS 238 (1974). See also, G.A. Res. 1803, § I(1), 17 U.N. GAOR, 2d Committee 237, U.N. Doc. A/C 2/5 R 850 (1962). Judge Hauk expressly relied on these U.N. resolutions in his conclusion that OPEC actions are governmental. 477 F. Supp. at 567 n.13.

123. G.A. Res. 3171, *supra* note 122.

124. See generally Charter of Economic Rights and Duties of States, G.A. Res. 3281, Ch. II, Art. 2(1), 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/RES/3281 (XXIX) (1974); Declaration on the Establishment of a New International Economic Order in 1974, G.A. Res. 3201 (S-VI), § 4(e), U.N. GAOR, (6th Spec. Sess.), Supp. (No. 1) 3, U.N. Doc. A/9559 (1974); G.A. Res. 3016, Preamble and § 1, 27 U.N. GAOR, Supp. (No. 30) 48, U.N. Doc. A/

ization of oil companies within the OPEC countries¹²⁵ is obviously a public act,¹²⁶ and it could be advanced, therefore, that the operation of such national companies can never be completely devoid of a public character. As a consequence, a strong argument for the invocation of the act of state doctrine, as well as sovereign immunity, must be countered in any attempt to question OPEC pricing activities.

A plaintiff seeking review of OPEC actions must be able to assert that his suit is not one in which nationalization or other "public acts" of OPEC are being questioned, but rather is centered solely on commercial activity. The IAM, for example, seems to rely heavily on distinctions made in the case of *Outboard Marine Corp. v. Pezetel*,¹²⁷ decided under the Foreign Sovereign Immunities Act, for their position that the act of state doctrine is inapplicable in a suit against OPEC.¹²⁸ *Outboard Marine* involved an antitrust action by an American producer of golf carts against a Polish entity which manufactured golf carts for export into the United States. The court stated that the factual situation of *Outboard Marine*, in which the *commercial* activities of a foreign trading company were being examined, might not involve the application of the act of state doctrine since the sovereign had "descended to the level of an entrepreneur."¹²⁹ In this manner the court distinguished a contrary result rendered in the case of *Hunt v. Mobil Oil Corp.*¹³⁰ *Hunt* involved a U.S. oil producer's antitrust claim against other U.S. producers arising out of Libyan nationalization of his oil field concessions. The Second Circuit held that the plaintiff's claim was non-justiciable under the act of state doctrine because it would require an examination of Libya's motives in its decision to nationalize.¹³¹ The *Outboard Marine* court reasoned that *Hunt*, like *Sabbatino*, involved the review of *governmental* expropriation of property contained within the sovereign's geographical limits, and consequently properly called for the invocation of the act of state doctrine.¹³² But where *commercial* activities were being examined, rather than *governmental* expropriations, the act of state doctrine might not be appropriate.¹³³ Because of other

8730 (1972); G.A. Res. 2158, § I(1), 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966).

125. Refer to note 108 *supra*.

126. *Victory Transport* listed among those acts it considered public in purpose, "legislative acts, such as nationalization." Refer to note 64 *supra* and text accompanying.

127. 461 F. Supp. 384 (D. Del. 1978).

128. See Plaintiff's Brief in Response to Order to Show Cause at 24-27.

129. 461 F. Supp. at 398 (citing language found in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977)).

130. 550 F.2d at 68.

131. *Id.* at 73.

132. 461 F. Supp. at 398.

133. *Id.*

grounds,¹³⁴ however, the court in *Outboard Marine* did not directly resolve this key question which it suggested had been posed but not firmly answered by the Supreme Court in *Dunhill*; that is, "whether commercial activity of a sovereign state falls outside the protective mantle of the act of state doctrine."¹³⁵ The district court in *Outboard Marine* did intimate that such an exception would be valid, saying that should this question be addressed in the future, "it would have to be evaluated in light of the Foreign Sovereign Immunities Act which by its terms denies immunity to commercial acts of the sovereign."¹³⁶

In relying on *Outboard Marine*, IAM seeks to counter the invocation of the act of state doctrine by first characterizing OPEC oil pricing as a purely commercial activity falling within the immunity exceptions of the Foreign Sovereign Immunities Act. Although Judge Hauk rejected this initial premise, this author believes he could have properly found OPEC actions to be within the broad meaning of "commercial activity" as defined by the Act.¹³⁷ IAM then maintains that such commercial activity would therefore be ripe, in light of the goals of the Foreign Sovereign Immunities Act, for a firm judicial establishment of a similar commercial exception to the act of state doctrine. The argument follows that this course of action would be appropriate since Congress had already firmly established the commercial activities exception to the sovereign immunity doctrine through the passage of the Foreign Sovereign Immunities Act. At first glance this argument elicits a sense of persuasive logic, for it would seem that anything less than the clear establishment of this act of state exception would allow any country to defeat the express purpose of the Foreign Sovereign Immunities Act by permitting absolute immunity to enter through the side door under the guise of act of state.¹³⁸ The syllogistic quality of such an argument must not, however, lead one to conclude that the act of state doctrine would not still be appropriate in a suit against OPEC. As previously noted, the act of state doctrine is deeply rooted in notions of international comity and respect for the executive's conduct of foreign af-

134. The foreign trading company, Pezetel, was held to be distinguishable from Poland and thus not entitled to treatment as a sovereign government. *Id.*

135. *Id.*

136. *Id.*

137. This conclusion rests primarily upon the express language in the legislative history of the Foreign Sovereign Immunities Act, which states that the term "regular course of commercial conduct" as used in 28 U.S.C.A. § 1603(d) is intended to encompass the carrying on of such commercial operations as an oil company. HOUSE REPORT, *supra* note 40, at 16. Judge Hauk avoided this clear expression of Congressional intent to include state-owned oil companies within the commercial activity exception of 28 U.S.C.A. § 1605(a)(2) by the creation of his proprietary-governmental distinction. *See* note 114 *supra*.

138. Refer to note 88 *supra* and text accompanying.

fairs.¹³⁹ Before that doctrine can be limited or held inapplicable in a given case, there consequently must be an evaluation in terms of its international ramifications.¹⁴⁰ For example, the court in *Outboard Marine* foresaw no political embarrassments in subjecting a Polish entity, or even the Polish government itself, to U.S. court review of its purely commercial sales of golf carts to this country.¹⁴¹ On the other hand, the issue involved in an antitrust action against the OPEC nations is far different. The political implications are obvious and sweeping. Although *Outboard Marine* views the act of state doctrine as unwarranted under its facts, that court could surely not have envisioned its commercial activities language to be extended to so ominous a degree. To imply that sovereignty would not be insulted by subjecting thirteen countries with global influence to the sanctions of U.S. law simply because their alleged wrongful conduct was commercial in nature is wholly untenable. This reasoning fails to account for the far-reaching political considerations involved in a suit brought in a consuming nation against a large producing cartel.¹⁴²

As a result, IAM, or any similar plaintiff, faces severe obstacles in obtaining review of OPEC activity. In summary, it is concluded that subject-matter and *in personam* jurisdiction could be obtained over OPEC by virtue of the restrictive theory provisions of the Foreign Sovereign Immunities Act through a broad reading of the term "commercial activity." Judge Hauk, in choosing to narrowly define that term and thus defeat subject-matter jurisdiction under the Act, ended the need for any additional inquiry. For the purposes of examining other legal issues which are presented by a suit against OPEC we will, however, assume a broad reading of commercial activity in order to meet the first hurdle of subject-matter jurisdiction. Secondary to the determination of subject-matter jurisdiction, and inextricably linked to it by the terms of the Act, is an examination of the underlying cause of ac-

139. Refer to notes 71-80 *supra* and text accompanying.

140. *See, e.g.*, 461 F. Supp. at 398.

141. *Id.*

142. Arguably, this is the type of situation contemplated in *Sabbatino* that "touches much more sharply on national nerves than do others" and consequently, calls for invocation of the act of state doctrine. Refer to note 91 *supra* and text accompanying for a different interpretation of this same phrase.

The political considerations involved are exemplified by a report which noted: "the stakes are very high. The financial and economic health of the Western world [is] at issue." SUBCOMMITTEE ON MULTINATIONAL CORPORATIONS, 93RD CONG., 2D SESS., REPORT TOGETHER WITH INDIVIDUAL VIEWS TO THE COMMITTEE ON FOREIGN RELATIONS 7 (Comm. Print 1975). *See generally*, N.Y. Times, July 24, 1979, § A, at 15, col. 1; 77 DEP'T STATE BULL. 150 (1977); Presidential Energy Message to Congress (June 7, 1977), 1 ENERGY MANAGEMENT (CCH) ¶¶ 709, 713; 76 DEP'T STATE BULL. 62-63, 642 (1977); Brief in *amicus curiae*, Indonesia-U.S. Business Committee of the Indonesian Chamber of Commerce and Industry at 7.

tion,¹⁴³ which is the topic of the following section. Assuming that all requisite jurisdictional obstacles could be met under the Foreign Sovereign Immunities Act, there remains the very grave and delicate issues of how the Act affects the doctrine of act of state and the degree to which the act of state doctrine should be clearly defined in order to be consistent with the goals expressed by Congress in the Foreign Sovereign Immunities Act. Current case law does not provide a firm answer as to the propriety of an act of state preclusion to judicial examination of OPEC's activities. The Supreme Court has spoken only once in this area,¹⁴⁴ and the resulting differences of interpretation manifested in the *Dunhill* decision as to the proper scope of the act of state doctrine in commercial settings makes any prediction as to its application in a suit against OPEC tenuous at best.

III. ESTABLISHING AN ANTITRUST CLAIM AGAINST OPEC

As one court recently noted, "[t]here is no doubt that American antitrust laws extend over some conduct in other nations."¹⁴⁵ This section views the actual scope of this international reach of U.S. antitrust laws through an examination of the existing case law. In addition, an ancillary antitrust issue is raised by the current lawsuit—whether a party who is not the direct victim of the antitrust violation may obtain relief, as in the case of IAM, as an indirect purchaser of price-fixed oil. This section consequently explores both OPEC's status as a defendant under the antitrust laws as well as the propriety of a plaintiff such as IAM seeking private enforcement of those laws.

A. *United States Antitrust Law*

In its suit against OPEC, IAM asserts causes of action under the Sherman Act¹⁴⁶ and the Wilson Tariff Act.¹⁴⁷ The Supreme Court has clearly stated that price-fixing is a *per se* violation of United States antitrust law¹⁴⁸ and that no exception is recognized for the oil industry.¹⁴⁹ Since the illegal agreements here alleged did not take place within the United States and were committed by foreign sovereigns, additional inquiries are obviously raised: 1) what is the extraterritorial scope of

143. Refer to note 103 *supra*.

144. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

145. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 608 (9th Cir. 1977).

146. Refer to note 4 *supra* and text accompanying.

147. Refer to note 5 *supra* and text accompanying.

148. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 1, 218 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

149. 310 U.S. at 222.

the Sherman Act, and 2) can foreign nations themselves be liable under the Sherman Act.

The first case to deal with the extraterritorial effect of the Sherman Act was *American Banana Co. v. United Fruit Co.*¹⁵⁰ The suit involved a U.S. plaintiff's claim of anticompetitive acts on the part of the defendant U.S. company, committed in South America with the assistance of the Panamanian government. The Supreme Court held that since the complained of acts were committed outside U.S. jurisdiction, the Sherman Act did not apply.¹⁵¹ This strict territorial construction of the antitrust laws was short-lived, however, as several cases began to limit the holding of *American Banana*. In *United States v. Sisal Sales Corp.*,¹⁵² the Supreme Court held that the defendant company, acting both in the United States and in Mexico, had conspired to restrain trade in the importation and sale of sisal, a rope fiber. The fact that part of the conspiracy took place in Mexico and was aided by Mexican legislation did not negate application of U.S. antitrust sanctions.¹⁵³

This narrowing trend was continued and applied to international cartels in a number of subsequent cases in which the United States successfully brought actions against cartels in which major U.S. firms were participants.¹⁵⁴ One commentator noted that the impact of these cases is to clearly establish that international cartels restricting U.S. trade or restraining competition are actionable under United States antitrust law.¹⁵⁵ The most important of these cases, in terms of its precedential effect, is *United States v. Aluminum Co. of America (Alcoa)*.¹⁵⁶ In that case a Canadian subsidiary of Alcoa entered into a cartel agreement with German, Swiss, French and British producers by which they formed a foreign corporation, Alliance, through which they fixed production quotas. The Second Circuit, holding that this agreement was both intended to and did affect imports into the United States and was in violation of the Sherman Act, stated: "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its alle-

150. 213 U.S. 347 (1909). Refer to note 76 *supra* and text accompanying.

151. 213 U.S. at 355-57.

152. 274 U.S. 268 (1927).

153. *Id.* at 276.

154. *See, e.g.*, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. Watch Makers of Switz. Information Center, Inc.*, [1963] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 70,600 (S.D.N.Y. 1962), *order modified*, [1965] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 71,352 (S.D.N.Y. 1965); *United States v. Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955); *United States v. Holophane Co.*, 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd*, 352 U.S. 903 (1956); *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

155. *Fine, supra* note 43, at 286.

156. 148 F.2d 416 (2d Cir. 1945).

giance, for conduct outside its borders which the state reprehends; and these liabilities other states will ordinarily recognize."¹⁵⁷

The *Alcoa* case, in short, had the practical effect of extending Sherman Act coverage to anticompetitive conduct committed wholly outside the United States by non-U.S. parties as long as such conduct was intended to and did affect imports into the United States. The cartel cases decided after *Alcoa* closely followed its rule,¹⁵⁸ but in those cases, unlike *Alcoa*, there were also U.S. defendants, and for that reason jurisdiction was not solely based on the effects of the foreign activity within the United States. There are seemingly adequate grounds for strong reliance upon the strict application of the *Alcoa* rule by IAM, since section 1605(a)(2) of the Foreign Sovereign Immunities Act,¹⁵⁹ under which the suit against OPEC was brought, adopts a strikingly similar "effects" test.¹⁶⁰

The extraterritorial reach of United States antitrust law has also been evidenced in recent years through *private* antitrust actions brought against or involving foreign entities.¹⁶¹ The most important of these was the case of *Timberlane Lumber Co. v. Bank of America*¹⁶² wherein the plaintiff accused the defendant of conspiring to damage its timber concession in Honduras. The defendant set up governmental involvement by Honduras as a defense to the antitrust claim. The Ninth Circuit held that the act of state doctrine did not apply in this antitrust action in light of the relatively minor involvement of the Honduran government in the case.¹⁶³

The primary importance of the *Timberlane* decision is that it attempts to provide a workable framework that takes into account foreign policy considerations in determining subject-matter jurisdiction under the Sherman Act in extraterritorial contexts. The *Timberlane* court noted that until 1973 the United States had filed more than 200 foreign trade antitrust suits, none of which was lost because of lack of subject-matter jurisdiction over the alleged wrongful acts, and that in private antitrust suits dismissals were similarly infrequent.¹⁶⁴ The court made it clear that the contrary view expressed by the *American*

157. *Id.* at 443.

158. Refer to note 154 *supra*.

159. Refer to note 100 *supra* and text accompanying.

160. *Id.*

161. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Outboard Marine v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978) (decided after passage of the Foreign Sovereign Immunities Act).

162. 549 F.2d 597 (9th Cir. 1976).

163. *Cf.* *Hunt v. Mobil Oil Corp.* (private antitrust action precluded because it involved examination into Libya's motives), notes 130-31 *supra* and text accompanying.

164. 549 F.2d at 608 n.12.

Banana case was at best limited to its facts¹⁶⁵ and then proceeded to apply a new framework for the use of the well accepted *Alcoa* rule. The *Timberlane* court set up a tripartite analysis for the determination of subject-matter jurisdiction under the Sherman Act. First, as stated in *Alcoa*, there must be some effect, either actual or intended, on U.S. commerce. Second, the effect must be sufficiently large enough to present a cognizable injury to the plaintiff; that is, an actual civil violation of the antitrust laws. Third, the interest of the United States must be sufficiently strong enough, *vis-à-vis* the interests of the other sovereign, to justify an assertion of extraterritorial jurisdiction.¹⁶⁶ This third element reintroduces the international considerations of comity and fairness because the court felt that under certain circumstances an application of the direct and substantial effect test alone might allow jurisdiction over an action when these other important considerations would warrant dismissal.¹⁶⁷ The *Timberlane* court stated that awareness of the foreign implications in allowing subject-matter jurisdiction is particularly important in private antitrust suits since there is no opportunity for the executive branch to weigh these considerations.¹⁶⁸ The court outlines several elements to be considered in the determination of subject-matter jurisdiction,¹⁶⁹ all going to an examination of the conflicting interests of the two sovereigns brought together by the action. The practical effect of such a test is to once again raise the issues presented by the act of state doctrine in the preliminary determination of subject-matter jurisdiction under the antitrust laws.¹⁷⁰

165. *Id.* at 608-09.

166. *Id.* at 613.

167. *Id.*

168. *Id.*

169. These elements include:

- a) the degree of conflict with foreign law or policy;
- b) the nationality or allegiance of the parties and the principal places of business of corporations;
- c) the extent to which enforcement by either state can be expected to achieve compliance;
- d) the relative significance of effects on the United States as compared with those elsewhere;
- e) the extent to which there is explicit purpose to harm or affect American commerce;
- f) the foreseeability of such effect; and
- g) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 446 (1958) (similar variables) [hereinafter cited as BREWSTER]. Cf. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965) (listing similar elements).

170. Refer to notes 71-80 *supra* and text accompanying. The *Timberlane* court considered that a motion to dismiss based upon the act of state doctrine raised the objection of failure to state a claim upon which relief could be granted. In the antitrust context, the motion also is an objection to subject-matter jurisdiction by virtue of its nature as com-

The *Timberlane* analysis has thus far been adopted by two other Circuit Courts in similar antitrust actions.¹⁷¹ These decisions mark a definite rejection of the interpretation of act of state application in foreign antitrust suits given by the Second Circuit in *Hunt*.¹⁷² This conflict among the Circuits as to the propriety of examining acts in foreign nations under our antitrust laws is, in some measure, the result of the ambiguity left open as to the limits of act of state by the Supreme Court's plurality decision in *Dunhill*.¹⁷³ The Justice Department's Antitrust Division has stated that it hopes the Supreme Court will soon meet this question squarely "since foreign involvement in commercial activity is on the rise around the world, and an overly broad reading of the act of state doctrine allows defendants too large and too automatic a protection from potential liability."¹⁷⁴

Would the "jurisdictional rule of reason"¹⁷⁵ set forth by *Timberlane* bar the attainment of subject-matter jurisdiction over OPEC under the antitrust laws? In *Outboard Marine*,¹⁷⁶ like *Timberlane* and its progeny,¹⁷⁷ government involvement in the alleged wrongful conduct was minimal or incidental. In a suit against OPEC, government involvement is *total*. One might assert that *Timberlane* would clearly call for a finding of lack of subject-matter jurisdiction since its test was designed to insure that international comity would not be disturbed. In effect, the government of each OPEC country is the party responsible for the conduct complained of, that is, price-fixing. This fact could, however, be similarly emphasized in order to distinguish *Timberlane* and its jurisdictional rule of reason from the facts of an OPEC suit. An argument could be submitted that the *Timberlane* rule was designed to resolve issues of tangential governmental involvement whereas the Foreign Sovereign Immunities Act contemplates a different test for total commercial involvement of a foreign state by vesting subject-matter jurisdiction over the sovereign for its commercial acts.

plaining of failing to state a claim *under the antitrust laws*. 549 F.2d at 602. See FED. R. CIV. P. 12.

171. *Mannington Mills, Inc. v. Congoleum Corp.*, [1979-1] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 62,547 (3rd Cir. 1979); *Industrial Investment Dev. Corp. v. Mitsui & Co.* [1979-1] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 62,586 (5th Cir. 1979).

172. [1979-1] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 62,586.

173. Refer to notes 81-90 *supra* and text accompanying.

174. Address of Carl A. Cira, Jr., Assistant Chief, Foreign Commerce Section, Antitrust Division, Dept. of Justice, made to the Westchester-Fairfield Corporate Counsel Association (May 23, 1979). Copy on file at the HOUSTON JOURNAL OF INTERNATIONAL LAW.

175. 549 F.2d at 613 (quoting Kingman Brewster). This term was coined in BREWSTER, *supra* note 169, at 446.

176. Refer to note 127 *supra* and text accompanying.

177. Refer to notes 162 & 171 *supra*.

Such a distinction would be in conflict with the case of *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,¹⁷⁸ which held that the Sherman Act does not confer jurisdiction on United States courts over the acts of a foreign sovereign and that acts of business by a nation are, in effect, acts of a sovereign.¹⁷⁹ This case, and those analogous cases which grant immunity from the Sherman Act to state-action,¹⁸⁰ would seem to support the view that the conduct engaged in by the OPEC nations is beyond the reach of the Sherman Act. Judge Hauk relied heavily on these cases for an alternative ground for dismissal of IAM's complaint. Stating that foreign sovereigns are not "persons" under the Sherman Act's language, he concluded that OPEC nations have no antitrust liability.¹⁸¹ This decision, of course, disposes of the need for any *Timberlane*-type analysis. *Interamerican Refining* and the cases cited by Judge Hauk in this context were decided prior to the passage of the Foreign Sovereign Immunities Act. IAM had asserted at the hearing that these precedents had been altered by the Foreign Sovereign Immunities Act which, in its legislative history, expressly considered the application of the Sherman Act to the conduct of foreign states.¹⁸² Judge Hauk rejected this argument through a different interpretation of the legislative history.¹⁸³ Judge Hauk, in holding that he was still bound by those precedents which disallow a sovereign's liability under the Sherman Act, made an important first impression interpretation of the Foreign Sovereign Immunities Act. He did so despite the recent Supreme Court case of *Pfizer, Inc. v. India*¹⁸⁴ which held that a foreign nation may be a "person" under the Sherman Act when it appears as a plaintiff. The obvious issue of mutuality is presented by Judge Hauk's ruling that a foreign nation may sue but not be sued under United States antitrust law.¹⁸⁵

178. 307 F. Supp. 1291 (D. Del. 1970).

179. *Id.* at 1298.

180. *See, e.g., Parker v. Brown*, 317 U.S. 341, 351 (1943); *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 367 (9th Cir. 1974).

181. 477 F. Supp. at 570-71.

182. *Id.* at 571. That part of the legislative history reads: "Neither the term 'direct effect' nor the concept of 'substantial contacts' embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act . . . to any defendant. Thus, the bill does not affect the holdings in such cases as *United States v. Pacific & Arctic Ry. & Nav.*, 228 U.S. 87 (1913), or *Pacific Seafarers, Inc. v. Far East Line, Inc.*, 404 F.2d 803 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969)." (footnotes omitted). HOUSE REPORT, *supra* note 40, at 19.

183. Judge Hauk reasoned that since the legislative history states that the Foreign Sovereign Immunities Act was not intended to alter the application of the Sherman Act and *Interamerican Refining* was decided on point prior to the Act's passage, he was still bound by its holding. 477 F. Supp. at 572. He distinguished the two cases cited in the legislative history, *supra* note 181, in that they did not involve foreign sovereigns or nations. *Id.* at 571-72.

184. 434 U.S. 308 (1978).

185. 477 F. Supp. at 572. The issue of mutuality is especially noteworthy in an antitrust suit against OPEC since, in *Pfizer*, which Judge Hauk relied upon, the governments of two

The question of Sherman Act applicability to foreign state defendants in light of the Foreign Sovereign Immunities Act has not yet been directly decided by the U.S. Supreme Court. The emergence of foreign states as commercial enterprises engaging in cartel agreements which are denounced by our antitrust laws present an obviously complex set of issues. Even the Justice Department, which has the responsibility for public enforcement of the antitrust laws, is unsure of the Sherman Act's application in a suit against OPEC.¹⁸⁶ There are persuasive arguments to be asserted on both sides of the issue as to whether subject-matter jurisdiction under the Sherman Act should be granted. Until this issue is ultimately resolved by the Supreme Court, we must assume, at least for the purposes of this comment, that subject-matter jurisdiction does in fact lie in order to examine further issues presented by a suit against OPEC.

B. The Indirect Purchaser's Standing to Sue: The Passing-On Theory

In its suit against OPEC, IAM does not allege any direct purchases of oil or gasoline from the defendants. They claim indirect injury resulting from the purchase of gasoline from U.S. oil companies who had purchased price-fixed crude oil from OPEC. Since the plaintiff did not *directly* purchase any of the price-fixed products from OPEC, questions are raised whether they have standing to sue under the antitrust laws. While the traditional notions of standing¹⁸⁷ exist in antitrust litigation, there has also developed a unique rule of standing in antitrust cases that generally bars an indirect purchaser's suit. This theory had its origin in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,¹⁸⁸ where a plaintiff sought treble damages for the illegal overcharges of the defendant shoe manufacturer. The defendant contended that the plaintiff had suffered no cognizable injury since it had "passed-on" the illegal overcharge by means of raising its prices for shoes sold to its customers. The Supreme Court rejected the use of this so-called passing-on de-

OPEC countries, Iran and Kuwait, appeared as plaintiffs bringing suit under U.S. antitrust laws. 434 U.S. 309 at n.1. Judge Hauk felt that allowing a foreign state to appear as a plaintiff does not "require the Judiciary in any way to interfere in sensitive matters of foreign policy." 477 F. Supp. at 572 (quoting *Pfizer Inc. v. India*, 434 U.S. 309, 319 (1978)). He stated, however, that "[t]o include foreign nations within the ambit of 'persons' who may be sued as defendants . . . would require judicial interference in sensitive foreign policy matters." *Id.* This, of course, accords with traditional sovereign immunity and act of state theory. Refer to notes 46-52 & 80 *supra* and text accompanying.

186. See, Interview with Thomas Kauper, Antitrust Chief, ANTITRUST & TRADE REG. REP. (BNA) No. 705, at AA-3 (March 18, 1975); Comments of then attorney general Edward Levi, ANTITRUST & TRADE REG. REP. (BNA) No. 725, at A-12 (August 5, 1975).

187. See, e.g., *Association of Data Processing Servs. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968).

188. 392 U.S. 481 (1968).

fense, holding that if a plaintiff can show an illegal overcharge and the amount of that overcharge, he has made out a *prima facie* case of injury and damage under the antitrust laws.¹⁸⁹ The passing-on defense was not recognized because it would require insurmountable proof problems.¹⁹⁰ The Court did give recognition to the defense in certain limited circumstances where the proof problems would not be as great, namely, where there existed a costs-plus contract between the direct and indirect purchaser.¹⁹¹

Hanover Shoe addressed only the issue of *defensive* use of a passing-on theory and did not confront the question of whether an indirect purchaser may use a pass-on theory *offensively* as a ground for standing. To clarify the nature of such an offensive theory, we can apply it to the IAM fact situation. IAM is an indirect purchaser of OPEC oil through the purchase of petroleum products from third parties, the oil companies. IAM asserts that because of the price-fixing conduct of OPEC, the oil companies have been forced to purchase OPEC oil at higher prices, which are then "passed-on" to members of IAM by way of oil company increases in the retail purchase price of petroleum products. In this manner, IAM claims that it has been injured by the illegal acts of the OPEC defendants.¹⁹²

In *Illinois Brick Company v. Illinois*¹⁹³ the Supreme Court clearly rejected an unequal application as between plaintiffs and defendants of the pass-on theory, disallowing the *offensive* use of such a theory by an antitrust plaintiff who was an indirect purchaser from intermediate third parties. The U.S. Supreme Court outlined two reasons for their rejection of the offensive use of the pass-on theory. First, the Court felt such an allowance would create a serious risk of multiple liability for defendants. Second, the Court stated that the same evidentiary complexities and uncertainties involved in the defensive use of the pass-on theory would be even more amplified in its offensive use by a plaintiff several steps removed from the defendant.¹⁹⁴ The Court's reluctance to allow an offensive pass-on theory is exemplified by the following statement: "Permitting the use of pass-on theories . . . would transform treble damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchaser to middleman to ultimate consumers."¹⁹⁵

189. *Id.* at 489.

190. *Id.* at 492-94.

191. *Id.* at 494.

192. Plaintiff's Brief in Response to Order to Show Cause at 67.

193. 431 U.S. 720 (1977).

194. *Id.* at 730-31.

195. *Id.* at 737.

IAM argues that since the Court will not recognize an uneven application of the pass-on theory, then the limited exception recognized in *Hanover Shoe* which would allow for the defensive use of pass-on must also be extended to the offensive use of that theory.¹⁹⁶ They support this assertion by arguing that certain Federal pass-through regulations¹⁹⁷ are analogous to the cost-plus contract exception of *Hanover Shoe*. They also claim that U.S. oil companies have conspired with the defendants and that OPEC effectively controls the United States oil companies which supply products to IAM, thereby giving IAM standing to sue under an exception mentioned in *Illinois Brick*.¹⁹⁸ In an *amicus curiae* brief filed in response to IAM's right to sue in light of *Illinois Brick*, the Attorneys General of seventeen states argued that IAM's above assertions, if proven, would allow them to recover damages under the exceptions stated in *Hanover Shoe* and *Illinois Brick*.¹⁹⁹ The brief argues that the plaintiff's allegations of direct purchases from entities owned or controlled by the defendants as well as allegations that federal regulations have superseded competition in intervening markets confer standing upon IAM.²⁰⁰ Judge Hauk rejected these arguments and held that under *Illinois Brick*, IAM, as an indirect purchaser, is precluded from seeking any damages.²⁰¹ This decision is warranted

196. Plaintiff's Brief in Response to Order to Show Cause at 68.

197. IAM cites 15 U.S.C. § 753(b)(2)(A) (1976) which provides for: "A dollar-for-dollar pass-through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level." Plaintiff's First Amended Complaint at 16. See also 10 C.F.R. § 212.83 (1978).

198. Plaintiff's First Amended Complaint at 3-4. The control of the oil companies by OPEC, as well as the existence of federal pass-through regulations, *supra* note 197, arguably fit within an exception contemplated by *Illinois Brick*. That exception states that if an indirect purchaser can establish that ordinary competition forces in the intervening markets have been superseded so that "[t]he effect is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case," the indirect purchaser may recover. 431 U.S. at 736, n.16. See, e.g., *In re Western Liquid Asphalt*, 487 F.2d 191, 197-99 (9th Cir. 1973), *cert. denied sub nom. Standard Oil Co. of Cal. v. Alaska*, 415 U.S. 919 (1974); *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1969).

199. Memorandum of Law by State Attorneys General Submitted in Response to the Court's Questions Regarding Plaintiff's Right to Sue in Light of *Illinois Brick* at 8. The Attorneys General of the following states participated in this joint memorandum: Alabama, Alaska, Arizona, Connecticut, Florida, Iowa, Kansas, Minnesota, Nebraska, Nevada, North Dakota, Oregon, Tennessee, Texas, Washington, West Virginia, and Wisconsin.

200. *Id.* at 8-12.

201. 477 F. Supp. at 561. Judge Hauk did not accept the analogy between federal pass-through regulations and a true cost-plus contract since "[t]he pass-through, if it occurs at all, is not direct and is not easily measurable." *Id.* at 563. See also *amicus curiae* brief of the Indonesia-U.S. Business Committee of the Indonesia Chamber of Commerce and Industry at 92. He rejected the argument that OPEC controls the oil companies or that the oil companies are co-conspirators with OPEC on the grounds that the plaintiff failed to allege any facts to support such a theory and did not even name one domestic oil company engaging in such a conspiracy or as being controlled by OPEC. 477 F. Supp. at 563. See Plaintiff's First Amended Complaint at 3, 11.

since the arguments asserted by the plaintiff do not appear to have the requisite strength to overcome the clear intent of *Hanover Shoe* and *Illinois Brick*, which is obviously to restrict any use of the pass-on theory.

The ability of future plaintiffs to challenge OPEC actions as indirect purchasers must await further development in the law. There is some trend toward easing the way for indirect purchasers in antitrust suits, and conversely, a possible weakening of the precedential impact of *Illinois Brick*. One commentator has argued that *Hanover Shoe's* application to plaintiffs has been largely misunderstood;²⁰² and at least one court has noted that "[t]he attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of certain class of plaintiffs seems an ingenious attempt to turn the decision [*Hanover Shoe*] and its underlying rationale on its head."²⁰³ The Hart-Scott-Rodino Antitrust Improvements Act of 1976,²⁰⁴ it has been argued,²⁰⁵ expresses a Congressional intent contrary to the rule in *Illinois Brick* by authorizing the states to assert consumers' causes of action in a *parens patriae* capacity. In this manner the vast problems presented by joinder and large consumer class actions are presumably lessened.²⁰⁶ In addition, the legislative history of the Antitrust Improvements Act of 1976 endorsed the Ninth Circuit's view of the pro-enforcement thrust of *Hanover Shoe* articulated by *In re Western Liquid Asphalt Cases*²⁰⁷ and criticized those decisions barring use of the pass-on theory by plaintiffs.²⁰⁸

The U.S. Supreme Court's recent decision in *Reiter v. Sonotone Corporation*²⁰⁹ may also provide new impetus to this trend. In this case the Court allowed a class action²¹⁰ by purchasers of hearing aids to be brought against the manufacturer. The Court noted that section 4 of the Clayton Act²¹¹ contained very little in the way of restrictive language and was intended to protect all who are made victims of its for-

202. Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing On*, 123 U. PA. L. REV. 976, 993 (1975).

203. *In re Master Key Antitrust Litigation*, [1973-2] TRADE REG. REP. (CCH) (Trade Cas.) ¶ 74,680 (D. Conn. 1973).

204. 15 U.S.C. § 15(c)-(g) (1976).

205. 431 U.S. at 756-58 (Brennan, J., dissenting).

206. See FED. R. CIV. P. 19, 20, 23.

207. 487 F.2d 191 (9th Cir. 1973).

208. See 431 U.S. at 757 n.13.

209. 442 U.S. 330 (1979).

210. See FED. R. CIV. P. 23. The *Reiter* opinion noted that the treble damage remedy of § 4 of the Clayton Act took on new practical significance with the advent of this rule. 442 U.S. at 343 n.6.

211. Refer to note 8 *supra*.

bidden practices by "whomever they may be perpetrated."²¹² Although not directly addressing the issue of an indirect purchaser's right to sue under the Clayton Act, the Court did note that the fear expressed in *Hanover Shoe* of overburdening the courts with complex antitrust cases was not to be a controlling consideration since Congress had created section 4 of the Clayton Act "precisely for the purpose of encouraging *private* challenges to antitrust violations."²¹³ IAM asserts that *Reiter* indicates a recent reversal of the Court's direction by promoting antitrust causes of action for consumers.²¹⁴ They also rely on the Antitrust Enforcement Act of 1979,²¹⁵ which would extend standing to indirect purchasers under the antitrust laws, as demonstrating a Congressional intent to reverse the decision in *Illinois Brick*.²¹⁶

In sum, the ability of an association such as IAM or any future indirect purchaser of OPEC oil to bring private antitrust action for treble damages is obviously highly questionable. The holding of *Illinois Brick* has not yet been overruled and those cases and statutes which arguably limit or criticize it do not lend full support for so broad an extension of indirect purchasers' rights as is being urged for acceptance in the IAM case. Judge Hauk's repeated reliance on *Illinois Brick* in his dismissal clearly indicates its continued validity. In order to briefly address the questions of available relief, however, which is the subject of the next section, we must assume that the standing theory advanced by IAM is sufficiently valid in law to entitle them, as indirect purchasers, to seek redress under the antitrust laws for OPEC's actions.

IV. OBTAINING RELIEF: ENFORCEMENT AGAINST OPEC

In the event that the obstacles previously outlined are overcome by a plaintiff, and its suit against OPEC could prevail on the merits, what remedies does current law provide following judgment rendered against a foreign state? Although the enforcement issues raised are indeed important ones, only a brief survey will be attempted here. This section addresses the processes of attachment and execution, both prior and subsequent to the passage of the Foreign Sovereign Immunities Act, in the event a treble damage award was made against OPEC. Fur-

212. 442 U.S. at 337-38.

213. *Id.* at 244 [emphasis in original].

214. Plaintiff's Brief in Response to Order to Show Cause at 73.

215. See, STAFF OF SENATE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON ANTITRUST ENFORCEMENT ACT OF 1978, pt. 1, at 1-18 (Comm. Print 1978). In its report, the Committee expressed concern with the access to federal courts by foreign sovereigns as antitrust plaintiffs, noting its disfavor with the decision of *Pfizer, Inc. v. India*, 434 U.S. 308 (1978). The Committee, however, did not directly express its views as to the amenability of a foreign sovereign of an antitrust defendant in American courts. *Id.* at 28-30.

216. Plaintiff's Brief in Response to Order to Show Cause at 74.

ther, this section examines the availability and feasibility of injunctive relief to enjoin the OPEC defendants from future price-fixing agreements.

A. Attachment and Execution

Prior to the passage of the Foreign Sovereign Immunities Act, the traditional rule in the United States was that foreign states enjoyed absolute immunity from execution on their property following judgment. The case of *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*²¹⁷ is illustrative of this traditional view. There the Second Circuit, commenting on a judgment entered against Sweden which had consented to being sued, stated:

[C]onsenting to be sued does not give consent to a seizure or attachment of the property of a sovereign government. The clear weight of authority . . . is against all seizures, even though a valid judgment has been entered. . . . It is but recognizing the general international understanding, recognized by civilized nations, that a sovereign's person and property ought to be held free from seizure or molestation at all peaceful times and under all circumstances.²¹⁸

The court viewed the United States jurisdiction over the foreign state as allowing only the rendition of a verdict and entry of judgment.²¹⁹ As a result of such a limited view, the sovereign was obviously then at liberty to decide whether to pay the adverse judgment or simply ignore it.²²⁰ Despite the harshness to the judgment-creditor which necessarily followed from such absolute immunity from execution, the courts continually adhered to the view.²²¹ The effect of the Tate letter²²² in 1952, although marking a significant change in the application of the sovereign immunity doctrine, did not change the rule of absolute immunity from execution.²²³

The Foreign Sovereign Immunities Act made substantial changes in this absolute rule. The Act contains provisions which modify the traditional theory by enumerating certain exceptions to the previous complete barrier from execution.²²⁴ The framers drafted these provisions in order to make immunity from execution more closely conform

217. 43 F.2d 705 (2d Cir. 1930).

218. *Id.* at 708.

219. *Id.* at 709.

220. *Id.*

221. *See, e.g.*, *Bradford v. Chase Nat'l Bank*, 24 F. Supp. 28 (S.D.N.Y. 1938).

222. Refer to note 53-54 *supra* and text accompanying.

223. *See Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469, 473 (Sup. Ct. 1959).

224. 28 U.S.C.A. § 1610 (West Supp. 1981).

with the jurisdictional provisions which codify the restrictive theory of sovereign immunity.²²⁵ Section 1609 of the Act restates the concept of absolute immunity from attachment, arrest and execution,²²⁶ and section 1610 then lists exceptions to that general rule. The most relevant exceptions in the scope of a suit against OPEC are the provisions which state: "The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered . . . if the property is or was used for the commercial activity upon which the claim is based."²²⁷ The framers intended this section to encompass those activities contemplated by section 1605(a)(2),²²⁸ which provides the jurisdictional basis for IAM's suit.²²⁹ IAM, however, places its principal reliance on another excepting provision which mandates that *any* property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity will not be immune from execution if "the judgment relates to a claim for which the agency or instrumentality is not immune . . . regardless of whether the property is or was used for the activity upon which the claim is based."²³⁰ The selection of this provision by the plaintiff, rather than the previous one set forth, is that by its terms it clearly contemplates a much broader scope of non-immunity. IAM argues that the national oil companies of the OPEC states are "agencies and instrumentalities" of those states and asserts an "informed belief" that those entities and states are engaged in commercial activity in the United States through land and business investments, U.S. treasury notes, and other related activities.²³¹ IAM urges that such assets are attachable following judgment and that execution upon these commercial assets would be consistent with the commercial activity rationale used in obtaining jurisdiction over these foreign states in the first instance.²³² To do otherwise, they say, would make the Foreign Sovereign Immunities Act one which provides a right without a remedy.²³³ This theory of right to attachment and execution seems to find some

225. HOUSE REPORT, *supra* note 40, at 27. See also 28 U.S.C. § 1605 (1976).

226. 28 U.S.C.A. § 1609 (West Supp. 1981) states:

Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act the property in the United States of foreign state shall be immune from attachment arrest and execution except as provided in Sections 1610 and 1611 of this chapter.

227. *Id.* § 1610(a)(2).

228. HOUSE REPORT, *supra* note 40, at 28.

229. Refer to note 100 *supra* and text accompanying.

230. 28 U.S.C.A. § 1610(b)(2) (West Supp. 1981).

231. Plaintiff's Brief in Response to Order to Show Cause at 90.

232. *Id.* at 93.

233. *Id.* at 89.

support in the express language of the Act.²³⁴ The traditional view of absolute immunity from execution, however, may still be relied upon by the courts, just as reliance is often still placed in the traditional act of state theory or sovereign immunity in order to temper any expansive reading of the Act's provisions.

Of course, the foregoing assumes that IAM would be able to secure a judgment awarding treble damages against the OPEC defendants. Judge Hauk, in his early dismissal of the damage portion of IAM's complaint, strongly emphasized that under *Illinois Brick*²³⁵ the plaintiff, as an indirect purchaser, was precluded from seeking any damages.²³⁶ If his interpretation of *Illinois Brick* is upheld, the entire issue of attachment and execution on OPEC assets becomes moot, and the provisions of the Foreign Sovereign Immunities Act dealing with these concerns will not even be tested under the unique facts of an OPEC suit.

B. Injunctive Relief

The case of *Mid-West Paper Products Co. v. The Continental Group, Inc.*²³⁷ held that although indirect purchasers are precluded from seeking treble damages under the Clayton Act by virtue of *Illinois Brick*, they are not likewise barred from seeking injunctive relief under section 16 of that Act.²³⁸ The court made this determination by noting that the reasons set forth by the Supreme Court for limiting the availability of the treble damage remedy, such as, the risks of multiple liability and increasing complexity in antitrust actions, are not similarly present in a claim for injunctive relief.²³⁹ The holding, while conferring standing upon indirect purchasers to sue for injunctive relief, also mandates that those plaintiffs establish, as section 16 requires, that equity principles entitle them to injunctive relief.²⁴⁰ In order to establish the right to injunctive relief under section 16, the plaintiff must, therefore, "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or reoccur."²⁴¹

IAM points out that the Supreme Court has attached a flexible interpretation to the provisions of section 16 of the Clayton Act in or-

234. 28 U.S.C.A. § 1610(a)(2) (West Supp. 1981).

235. *Supra* note 193.

236. Refer to note 201 *supra*.

237. 596 F.2d 573 (3d Cir. 1979).

238. *Id.* at 575.

239. *Id.* at 590.

240. *Id.* at 594.

241. *Id.* at 591 n.72.

der to effect the purpose of enforcing the antitrust laws.²⁴² They urge that any court considering injunctive relief under section 16 must weigh such equitable considerations as the likelihood of irreparable damage, the public interest, and the balancing of hardships.²⁴³ The plaintiff then argues that its members, and the U.S. economy in general, are suffering irreparable harm as a result of OPEC's price-fixing activities which cause dramatic increases in domestic gasoline prices. The granting of injunctive relief, therefore, would most definitely be in the public interest.²⁴⁴ It is suggested that the OPEC defendants, on the other hand, would not suffer grave hardship from a halt in future price-fixing since they are realizing tremendous profits under current practices.²⁴⁵

Judge Hauk reaffirmed the principal of *Mid-West Paper* stating that an indirect purchaser could sue for injunctive relief under the antitrust laws.²⁴⁶ He denied such relief to the IAM plaintiffs, however, because he felt that the evidence adduced at the hearing did not support the granting of any injunctive relief.²⁴⁷ Judge Hauk stated that while a plaintiff is only required to show threatened loss or damage for an injunction under section 16 of the Clayton Act, that "damage must be proximately caused by the alleged anticompetitive actions of the defendants."²⁴⁸ He felt that the plaintiff IAM had failed to demonstrate this requisite causal connection between the alleged injury, a rise in domestic gasoline prices, and the alleged anticompetitive conduct of OPEC price-fixing.²⁴⁹ In fact, Judge Hauk viewed the evidence as demonstrating that Federal regulations, rather than OPEC pricing agreements, were primarily responsible for the plaintiff's alleged injury.²⁵⁰ Additionally, he felt that IAM's general theory of injury was too speculative since they had not made a specific showing that any of the gasoline they had purchased was manufactured from OPEC oil.²⁵¹

Even assuming that IAM, or any future plaintiff, could meet Judge Hauk's proximate causation test, there remains an obviously fatal flaw

242. Plaintiff's Brief in Response to Order to Show Cause at 95, *citing* *Hecht v. Bowles*, 321 U.S. 321, 329-30 (1944).

243. Plaintiff's Brief in Response to Order to Show Cause at 95.

244. *Id.* at 95-97.

245. *Id.*

246. 477 F. Supp. at 564.

247. *Id.* at 572.

248. *Id.* at 573.

249. *Id.* at 572.

250. Judge Hauk noted the existence of federal regulations which discourage refiners from adding refining capacity, reducing the supply through environmental regulation, and ear-marking the allocation of the existing supply. *Id.* at 573-74. He concluded that the "increases in domestic gasoline prices once again demonstrate that Federal regulation of the petroleum market has posed a greater threat to the American consumer than any other single factor." *Id.* at 574.

251. *Id.*

to asserting injunctive relief against OPEC, namely, lack of enforcement. It has been observed that a decree by a U.S. court enjoining "illegal" OPEC activity would have little positive effect.²⁵² Antitrust officials within the Justice Department have similarly noted that such an injunction would have little impact since such an order would be disputable under international law and because of the complete lack of sanctions if the injunction order was violated.²⁵³ In an *amicus curiae* brief filed by the Indonesia-U.S. Business Committee, it was again noted that such an order would be unenforceable because there is no "ample reservoir of power to command respect for its orders."²⁵⁴ During the hearing, Judge Hauk had articulated these same concerns in more frank language.²⁵⁵

IAM nonetheless contends that even if the enforceability of such an order is questionable, it should be issued in order to declare that certain practices by foreign states are condemned by our laws.²⁵⁶ The propriety of such a bold, but unenforceable, declaration by a U.S. court may be questioned as not being within the aims of the antitrust laws. Furthermore, if such a declaration was to be made, it should more appropriately be forthcoming from the executive branch, the primary arm of government for articulating this nation's foreign policies.²⁵⁷ In short, injunctive relief, even if it could be shown to be equitably warranted, is arguably not practical or appropriate in an action against OPEC.

V. CONCLUSION

The attempt to bring OPEC activity within the purview of United States antitrust law necessarily presents a complex range of legal issues involving interrelated questions of jurisdiction, standing, and enforcement of judgment. A private party-plaintiff seeking the adjudication of its alleged injury caused by the price-fixing conduct of OPEC will undoubtedly face the following numerous obstacles in maintaining a viable suit against this international cartel.

A jurisdictional foundation based upon the Foreign Sovereign Im-

252. Joelson & Griffin, *supra* note 71, at 637-38.

253. Interview with Thomas Kauper, Antitrust Chief, on Aug. 18, 1975 [1975] ANTI-TRUST & TRADE REG. REP. (BNA) AA-3.

254. *Amicus curiae* brief of the Indonesia-U.S. Business Committee of the Indonesia Chamber of Commerce and Industry at 105. (quoting *Hamilton v. MacDonald*, 503 F.2d 1138, 1146 (9th Cir. 1974)).

255. Judge Hauk was quoted as saying, "Suppose I issue an injunction. . . . How do I enforce it? Do I get some U.S. marshals and send them over to Saudi Arabia and say 'roll em back?'" *Houston Post*, Aug. 22, 1979, at 5B, col. 1.

256. Plaintiff's Brief in Response to Order to Show Cause at 8.

257. Judge Hauk agrees with this position. 477 F. Supp. at 575.

munities Act can only be achieved through a liberal interpretation of the Act's provisions. For example, in order to obtain subject-matter jurisdiction over the OPEC states, those exceptions to sovereign immunity which make the foreign state liable for its commercial activities must be viewed as being sufficiently broad in scope so as to encompass the price-fixing actions of OPEC. A narrow interpretation, as adopted by the district court in the IAM case, would characterize OPEC activity as governmental rather than commercial in nature, which would give rise to a valid claim of sovereign immunity. As a consequence, subject-matter jurisdiction would be defeated in the first instance by the very terms of the Act.

The act of state doctrine, which precludes review of the public acts of a sovereign committed within its own territory, may also render OPEC activity as non-justiciable in U.S. courts. Judge Hauk's precedent of characterizing OPEC's actions as public or governmental in nature, if followed, will clearly call for the invocation of the act of state doctrine in any future suit brought against the cartel. Even assuming that OPEC actions are eventually labeled as being purely commercial, the far reaching international ramifications caused by U.S. judicial review of the primary activity of thirteen sovereign countries may alternatively require that the act of state doctrine be invoked in order to preserve traditional notions of international comity. This result is especially likely since, unlike in the area of sovereign immunity, no commercial exception to the act of state doctrine firmly exists. Consequently, it may properly bar even those suits based on a sovereign's commercial acts when the international implications are as obvious and sweeping as those presented in a U.S. antitrust suit against the OPEC cartel.

In any event, United States antitrust laws arguably do not even extend to OPEC actions. Although the Sherman Act clearly reaches some activity abroad, it is probably inapplicable in a suit against such an influential cartel in light of recent cases which emphasize the balancing of international interests in the determination of extraterritorial applications of the Sherman Act. There is additionally grave conflict as to whether a foreign state, as a defendant, can even be a "person" under the antitrust laws. Unless the Foreign Sovereign Immunities Act is eventually interpreted to change those existing precedents which hold that states are not liable under the antitrust laws, no claim can properly be initiated against the sovereign membership of OPEC.

A private antitrust suit against OPEC is further ill-fated because of the questionable standing of an indirect purchaser as a plaintiff. The rule which generally bars an action by all but the direct victim of the

antitrust violation stands as a strong barrier to any suit based upon a consumer's alleged injury in paying inflated prices for gasoline. The policy against allowing a suit by individuals who are several steps removed from the antitrust violation would clearly preclude any type of consumer action directed against the setting of crude oil prices by OPEC. Although some trend is noted toward a relaxation of the general rule of antitrust standing which denies an indirect purchaser's suit, it is not at this time to the degree which would warrant a theory of OPEC liability to the U.S. gasoline consumer.

The absence of effective, enforceable relief against OPEC similarly calls for judicial abstention from future suits directed against the cartel. Since an indirect purchaser cannot recover damages, those provisions of the Foreign Sovereign Immunities Act which provide for attachment and execution following judgment are rendered moot. Although an indirect purchaser may sue for injunctive relief, an injunction which seeks to enjoin future OPEC price-fixing would be wholly symbolic since there is no adequate method of enforcing the court's orders.

The plaintiffs involved in the suit against OPEC are to be commended, however, regardless of their chances of success. Through this suit, new tests have been presented and important issues raised in our law of how best to judicially deal with the acts of foreign sovereigns. Although the plaintiffs will not ultimately prevail in their antitrust claim against OPEC, their suit has shed some light and given more substance to the often gray areas of antitrust and international law.

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