Maryland Journal of International Law

Volume 7 | Issue 1 Article 13

Judicial Abstention Through the Act of State Doctrine. International Association of Machinists v. Organization of Petroleum Exporting Countries, 649 F.2D 1354 (9th Cir. 1981)

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Recent Decisions

JUDICIAL ABSTENTION THROUGH THE ACT OF STATE DOCTRINE

International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries
649 F.2d 1354 (9th Cir. 1981).

In *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*,[1] the United States Court of Appeals for the Ninth Circuit weighed the applicability of the Act of State Doctrine[2] and the Foreign Sovereign Immunities Act (FSIA)[3] in an antitrust suit against foreign sovereigns. The court held the Act of State Doctrine applicable due to the politically sensitive nature of the foreign sovereigns' activities. The FSIA was held to be inapplicable and ineffective in granting the court jurisidction, despite any commercial nature of the sovereigns' activities.[4] This case provides a discussion of the availability of civil jurisdiction over foreign states as defendants — an area which is increasing in both judicial and political significance as foreign state enterprises become more involved in commercial activities inside the United States.

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1. IAM v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

2. The Act of State Doctrine is a policy of judicial abstention which may bar United States citizens' suits against foreign sovereigns.

3. 28 U.S.C. §§ 1330(d), 1602 *et seq.* (1976). The FSIA defines the circumstances in which foreign states are granted immunity from suit by United States citizens. The major area of exception is § 1605(a)(2), which provides

> § 1605(a). A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1330(d) provides the courts jurisdiction in non-jury civil actions against foreign states. Section 1604 grants foreign sovereigns immunity from suit, subject to the exceptions set forth in 28 U.S.C. §§ 1605-07. According to § 1603(d), a "commercial activity" is "either a regular course of commercial conduct or a particular 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."

4. 649 F.2d *supra*. As a basis for its holding, the court stated that the Act of State Doctrine had not been superseded by the FSIA, and thus the court was free to deny jurisdiction under the Act of State Doctrine, even when the FSIA would have provided jurisdiction.

FACTUAL BACKGROUND

The International Association of Machinists and Aerospace Workers (IAM) is a nonprofit labor association whose members work in industries that consume large quantities of petroleum products. IAM brought suit on behalf of its membership as consumers of petroleum products in the United States District Court for the Central District of California, against the Organization of Petroleum Exporting Countries (OPEC) and OPEC's thirteen member nations.[5] The OPEC organization was formed in 1960 for the purpose of stabilizing the world's oil prices as part of an effort to obtain the greatest possible economic return for the valuable natural resources of the member states. IAM claimed financial injury due to inflated oil prices allegedly caused by OPEC's price-fixing activities.[6] IAM also alleged a deliberate targeting and victimization of the U.S. market by OPEC and sought injunctive relief and treble damages.[7]

In refusing to hear IAM's claim for damages, the district court held that the plaintiff's relationship with defendant was too remote to allow for dollar damages under the indirect purchaser rule of *Illinois Brick Co. v. Illinois*.[8] OPEC and its member nations refused to submit to the jurisdiction of the court, and their case was argued and briefed by various *amici*.[9] Since entry of a default judgment against foreign defendants is prohibited by the FSIA, the district court ordered a full hearing on the injunction issue.[10] After considering extensive statistical and technical data, the court dismissed the case for lack of personal jurisdiction over the defendants.[11] Judge Hauk held that the defendants, as foreign states, were protected by the immunity

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5. IAM v. OPEC, 477 F.Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

6. *Id.* at 558–59.

7. *Id.*

8. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). *Illinois Brick* required a proximity between tortfeasor and plaintiff in suits for money damages in order to avoid problems of multiple litigation and the impracticability of recovering damages from a long line of purchasers in the chain of distribution. In IAM v. OPEC the court held that IAM's claim for treble damages was susceptible to such problems because there were six separate purchases between defendant and plaintiff. The *OPEC* court allowed suit for injunctive relief under *Illinois Brick*, because such a remedy would avoid many of the problems encountered when a indirect purchaser sues for money damages.

9. For a detailed list of the concerned parties, *see* 477 F.Supp *supra* at 557–58.

10. Section 1608(e) of the FSIA prohibits entry of a default judgment against a foreign sovereignty "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

11. 477 F. Supp. at 553.

granted to them by Section 1604 of the FSIA.[12] The court held that the actions of OPEC's members concerned the allocation of natural resources by foreign sovereigns — activities that are inherently political and thus non-commercial.[13] Defendants' activities, therefore, were not included in the "commercial activity" exception to Section 1605 of the FSIA, which would have forfeited their immunity.[14]

The Court of Appeals for the Ninth Circuit, although reaching the same result, did not adhere to the reasoning of the lower court. Circuit Judge Choy found that due to the political sensitivity of the suit, the Act of State Doctrine mandated that "exercise of federal court jurisdiction in this case would be improper."[15] By affirming the lower court's refusal to exercise jurisdiction based upon the Act of State Doctrine, the circuit court found it unnecessary to address the issues raised in the district court regarding applicability of the FSIA, the indirect purchaser rule, and the extra-territorial reach of the Sherman Act.[16]

This note will present the Circuit Court of Appeals' decision in its historical context, analyze the soundness of the decision, and discuss its applicability to future plaintiffs who may seek relief from the activities of foreign sovereigns in the commercial marketplace.

THE ACT OF STATE DOCTRINE

The Act of State Doctrine (the "Doctrine") is a policy of judicial abstention that bars United States citizens from obtaining judgments against foreign governments by prohibiting U.S. courts from passing on the lawfulness of acts of foreign governments that are committed within that

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12. As a preliminary matter, the court dismissed the claim against the OPEC organization itself, holding that as a foreign organization, OPEC could not be and was not properly served.

13. *Id.* The court implies by this dichotomy that an activity cannot be commercial if it is political. This idea is alien to the definition of "commercial" as provided in the legislative history to the FSIA. "A contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity." H.R. REP. No. 1487, 94TH CONG., 2d Sess. 16, *reprinted in* (1976) U.S. CODE CONG. & AD. NEWS 6604, 6615. The maintenance of armed forces is traditionally a political activity. Thus, the commercial-political dichotomy is inapplicable to a case applying the FSIA. *See* Corcker, *Sovereign Immunity and the Suit against OPEC*, 12 CASE W. RES. J. INT'L. L. 215 (1981).

14. *See supra* note 3. The district court also held that a foreign sovereign could not be a defendant in an antitrust action. 477 F. Supp. at 570–72.

15. 649 F.2d at 1355.

16. *Id* at 1361-62.

government's sovereign territory.[17] The Doctrine even bars evaluation of the legality of the act of state under the laws of the country in which the act occurred.[18]

The Doctrine can be applied by the executive branch of the United States government, can be pleaded by foreign government defendants, or can be raised during trial as an affirmative defense or to assert lack of subject-matter jurisdiction. If the Doctrine is applied by a court, it is the basis for a foreign sovereignty's immunity from suit.[19]

The Doctrine is founded on the rationale that mutual respect exists between sovereign states and that failures of this respect should not be handled judicially, but diplomatically; facilitating the delicate manipulation of foreign policy.[20] By preventing inconsistent policy determinations by the judicial and executive branches of government, the Doctrine promotes a coherent appearance of U.S. foreign policy, and thus prevents politically embarrassing situations in which the President and the courts could oppose one another in their treatment of foreign policy issues.[21]

THE NINTH CIRCUIT'S RATIONALE

The Ninth Circuit in *IAM v. OPEC*,[22] described the doctrine of sovereign immunity as one that arose out of international custom.[23] The court described how an exception to that immunity developed regarding the commercial activities engaged in by a state. "Immunity did not exist for commercial activities since they were *non-sovereign*" (emphasis supplied).[24] In 1976, the custom and its exception became law when Congress consolidated their concepts into the FSIA.[25]

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17. The United States' statement of the Act of State Doctrine originated in Underhill v. Hernandez, 168 U.S. 250 (1897). "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252.

18. *See generally,* Mathias, *Restructuring the AOSD: A Blueprint for Legislative Reform*, 12 LAW & POL. IN INT'L BUS. 369 (1981). *See also,* 127 CONG. REC. 7120 (June 25, 1981).

19. 28 U.S.C. § 1604.

20. 168 U.S. 250 (1897). *See also,* Cooper, *Act of State & Sovereign Immunity: A Further Inquiry,* 11 LOY. CHI. L.J. 193 (1980).

21. *See* Hahn, *Dunhill v. Republic of Cuba: A Reformulation of the Act of State Doctrine*, 11 U.W.L.A. LAW. REV. 15 (1979); Cooper, *Act of State & Sovereign Immunity: A Further Inquiry,* 11 LOY. CHI. L.J. 193 (1980).

22. 649 F.2d 1354.

23. *Id.* at 1357.

24. *Id.*

25. *See supra* note 3.

The FSIA established the test to be applied in determining whether a sovereign act was commercial: "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."[26]

The Ninth Circuit recognized this Congressional requirement and even analyzed the rationale behind the distinction drawn between the nature-of-the-act test and the purpose-of-the-act test. The nature test is objective because it focuses solely on the type of activity, not the reason behind it. The purpose test is subjective because it goes beyond the nature of the act to the underlying reasons for it. Because even the most obvious commercial activity could have a governmental purpose,[27] the purpose test grants broader immunity. The court noted that Congress recognized the difference between the two options and specifically chose to include the nature test in the statute.[28]

Despite such obvious and clear intent by Congress to have courts focus solely on the objective nature of an activity, the court held that such intent does not supersede the "old" Act of State Doctrine principles.[29] Although elements of the sovereign immunity doctrine were relevant to the *IAM* case, the court reasoned that the FSIA was not applicable because it did not consider the political repercussions of a judicial remedy. The Act of State Doctrine, on the other hand, requires sensitivity to the sovereignty of other nations and for that reason the court applied the latter doctrine.[30]

After reviewing the various benefits which have led to the creation and continued use of the Act of State Doctrine, the court discussed several reasons why that doctrine should prevail in the present case. First, the court noted similarities between the Act of State Doctrine and the political question doctrine in domestic law. The political question doctrine "requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question."[31] The

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26. 28 U.S.C. § 1603(d). *See supra* note 3.

27. *See* 649 F.2d at 1357 n. 6.

28. *Id.* at 1357. *See supra* note 13. The court was not unaware of Congressional intent. *See infra* notes 69-74.

29. *Id* at 1359.

30. *Id.* at 1360. The court here uses distinctions between the Act of State Doctrine and the FSIA to justify its preference. Although these differences do exist, the Act of State Doctrine does not specifically exclude application of the FSIA, as the court implies.

31. *Id.* at 1358-59. The political question doctrine was stated in Baker v. Carr, 369 U.S. 186 (1962). The doctrine is misnamed, as it deals with the justiciability of an issue, rather than the issue's political nature. The doctrine concerns "the relationship between the judiciary and the coordinate branches of the Federal Government." *Id.* at

political question doctrine is grounded in the principle of separation of powers, an idea which is "central to our form of democratic government."[32] The court reasoned that the similarities between the Act of State Doctrine and the political question doctrine cause the Act of State Doctrine also to be integral to our structure of government and thus to be paramount to other countervailing considerations in the area of judicial abstention.[33] As such, the Act of State Doctrine must be examined *before* considering any grant of jurisdiction that may have been made available by the legislative branch.

The court also reasoned that the significant differences between the FSIA and the Act of State Doctrine cause the latter to prevail. Sovereign immunity is solely jurisdictional because it relates only to the availability of judicial power. The Act of State Doctrine, on the other hand, is a non-jurisdictional doctrine that is more prudential since it concerns the appropriate use of that power and can be employed "to avoid judicial action in sensitive areas."[34] The court found sovereign immunity to be simply a statutorily-recognized principle of international law. The Act of State Doctrine, on the other hand, is a domestic legal principle with broader applications that can be invoked in any case where state sovereignty is challenged.[35] As a result, the Act of State Doctrine is applicable whenever a court considers sensitive issues involving sovereignty.[36]

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210. When applied, the doctrine renders an issue nonjusticiable, due to the judiciary's respect for another branch of the government or a desire to avoid embarrassment to another branch regarding a policy decision already made. *See also,* Powell v. McCormack, 395 U.S. 486 (1969); U.S. v. Nixon, 418 U.S. 683 (1974) and NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW, 100–10 (1978).

32. 649 F.2d at 1359.

33. The first similarity outlined by the court is that both doctrines require courts to defer to the legislative and executive branches in certain situations. The court reasoned that despite the legislative mandate in the FSIA, the Act of State Doctrine was applicable, because "like the political question doctrine, its (the AOSD) application is not subject to clear definition." *Id.* at 1358–59. The amorphous nature of the Act of State Doctrine, as compared to the clear mandate from Congress in the FSIA, appears to be especially attractive to the court.

34. *Id.* at 1359.

35. *Id.* The Act of State Doctrine has been considered in cases where no foreign sovereign was a party to the suit. In Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), the Act of State Doctrine was raised by the defendant bank (not a branch of a foreign sovereign) in an effort to prevent the examination of transactions by the Honduran government. *See infra* note 39 and accompanying text. *See also,* Bokkelen v. Grumman Aerospace Corp., 432 F. Supp. 329 (E.D.N.Y. 1977).

36. 649 F.2d at 1359.

The court recognized that the differences between the two doctrines would have to be disregarded if Congress so mandated.[37] After reviewing the legislative history of the FSIA, as well as previous Congressional discussions of sovereign immunity, the court concluded that Congress did not intend for the FSIA to supercede the Act of State Doctrine, thus leaving it intact.[38] Judicial precedent also suggested that the Act of State Doctrine, rather than FSIA, be used whenever a politically sensitive issue was sought to be avoided. In deciding (contrary to the mandates of the FSIA) that the subjective purpose of an action is the dispositive criterion, rather than the action's objective nature, the court relied on *Timberlane Lumber Co. v. Bank of America*[39] by citing, "This court has stated that the motivations of the sovereignty must be examined for a *public interest basis* (emphasis supplied)."[40] The issue in *Timberlane* was whether previous proceedings brought by the present defendants in Honduras courts and the Honduran government's enforcement of the resultant rulings, constituted an act of state by the Honduran government. In the Honduran case, the plaintiff alleged that the defendants had conspired to unite their claims against the plaintiff and sought to deny it the opportunity to settle its debts out of court.[41] As a result of the alleged conspiracy, and the court orders that followed the suit, the plaintiff's business in Honduras was destroyed. The defendants in *Timberlane* contended that the Honduran court orders were acts of state by the Honduran government since they were issued and enforced by that sovereign. The defendants contended that because the Act of State Doctrine prevented judicial examination of such acts, the suit must be dismissed.[42] The Ninth Circuit in *Timberlane* found the Act of State Doctrine inapplicable because although the actions that caused the plaintiff's downfall were governmental in origin, the purpose behind those actions was not to protect a public interest, but to protect the interests of private litigants working

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37. The court specifically stated that the Act of State Doctrine was *not* superseded by the FSIA. *Id.*

38. *Id.* at 1359-60. *See infra* notes 61-74 and accompanying text.

39. *See supra* note 35.

40. 649 F.2d at 1360. The court cited *Timberlane* (a pre-FSIA opinion also written by Judge Choy of the Ninth Circuit) as authority for the court's use of the purpose test rather than the nature test in assessing the commercial character of an activity. The court did not cite any post-FSIA case as authority for its decision to apply the Act of State Doctrine.

41. 549 F.2d at 604.

42. *Id.* at 604-05.

through Honduran law.[43] The court held that Honduras had not been acting for itself (*i.e.*, it did not have a claim against the plaintiff), but was acting merely as the adjudicator of a private dispute. The rulings of the Honduran court, therefore, were reviewable.[44]

Drawing from the reasoning of *Timberlane,* the court in *IAM v. OPEC* determined that applicability of the Act of State Doctrine centers on the underlying purpose (public or private) of a sovereign's actions. "When the state *qua state* acts in the public courts its sovereignty is asserted."[45] In such cases "the courts must proceed cautiously to avoid an affront to that sovereignty."[46] The FSIA, therefore, may not be invoked when a public interest is involved, because it ignores the sovereign's underlying purpose, which was found to be essential in *Timberlane.* The court went further to hold that the commercial nature of any sovereign act that might lead a court to consider the FSIA should be disregarded. Judicial caution is paramount and "the Act of State Doctrine remains available when such caution is appropriate, *regardless of any commercial component* of the activity involved" (emphasis supplied).[47]

The court's second major argument resting on precedent in favor of the Act of State Doctrine was based on the approach used in *Banco National v. Sabbatino,*[48] a case involving a suit brought by a financial agent of the Cuban government to recover payment from one of the agent's American brokers for conversion of bills of lading. The Act of State Doctrine was raised by the respondent to prevent judicial inspection of the original agreement made by the Cuban government.[49] The Ninth Circuit, in *IAM v. OPEC,* cited *Sabbatino* and applied the approach it called for in striking a balance between the public's need for a judicial remedy against the potential for interference with U.S. foreign relations. "[S]ome aspects of international law touch more sharply on national nerves than do others; the less important the

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43. *Id.* at 608. Obviously, enforcement of Honduran law is in the public interest. Since such an interest is not limited to the *Timberlane* case, the court in IAM v. OPEC held that examination of OPEC governmental actions would not involve evaluation of specific policy decisions by OPEC governments. As a result, OPEC actions should not have been immune from U.S. judicial review.

44. *Id.* It is relevant to note that *Timberlane* challenged neither the propriety of the laws of the Honduran government, nor that government's application of its own laws.

45. 649 F.2d at 1360.

46. *Id.*

47. *Id.*

48. Banco National v. Sabbatino, 376 U.S. 398 (1964).

49. *Id.* at 400–08.

implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."[50]

In balancing the various interests involved in this suit, the Ninth Circuit found that the record revealed significant involvement by the executive and legislative branches with the oil pricing problem. The court noted that even IAM did not dispute the United States' "grave interest in Mideast petropolitics."[51] Because monitoring the activities of OPEC is a sensitive area of American foreign policy, the possibility of judicial interference in U.S. foreign relations became extremely significant. The court held, therefore, that the *Sabbatino* balance tipped decidedly toward judicial abstention.[52]

The *OPEC* court also applied a second aspect of the *Sabbatino* decision — that of "the availability of internationally accepted legal principles which would render the issues appropriate for judicial disposition."[53] Quoting *Sabbatino,* the court took notice that the greater the international consensus concerning an issue, the more appropriate it is for the judiciary to deal with that issue.[54] Such a consensus gives the court clear and accepted guidance in how to decide a case. In examining the international consensus concerning the issues involved in this case, the Ninth Circuit found the principle of state sovereignty more universally accepted than antitrust laws. "The United States and other nations have supported the principle of supreme state sovereignty over natural resources."[55] The *OPEC* case points out, however, the disagreement which is festering among nations concerning antitrust law. "The record reveals no international consensus condemning cartels, royalties and production agreements . . . [t]he OPEC nations themselves obviously will not agree that their actions are illegal."[56] The court reasoned that

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50. 649 F.2d at 1360, *citing, Sabbatino, supra* note 48 at 428.

51. 649 F.2d at 1361.

52. *Id.* For a further discussion of this balance, *see infra* note 89 and accompanying text.

53. *Id.*

54. 649 F.2d at 1361, *citing, Sabbatino, supra* note 48 to 428:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

55. 649 F.2d at 1361.

56. *Id.* The court seems to be considering the opinion of the defendants in making its determination of the legality of their actions. If courts generally considered defendants' opinions as dispositive in deciding antitrust suits, convictions under the Sherman Act would be rare indeed.

judicial action in such an area of international disagreement would be inappropriate.

The *OPEC* court concluded by stating that because the Act of State Doctrine bars judicial entrance into an area best left to the legislative and executive branches of our government, "the issue of whether the FSIA allows jurisdiction need not be decided, since a judicial remedy is inappropriate regardless of whether jurisdiction exists."[57] Similarly, the court held that it did not need to reach either of the other issues raised by the lower court: the indirect-purchaser rule and the availability of foreign sovereigns as antitrust defendants.[58]

ANALYSIS OF THE DECISION

In choosing to apply the Act of State Doctrine instead of the FSIA, the court found that:

(1) The Act of State Doctrine was not superseded by the FSIA due to the intent expressed by Congress in both 1973 and 1976;[59]
(2) The FSIA and the Act of State Doctrine address different concerns because the FSIA ignores the underlying purpose of a sovereign's activities, while the Doctrine is more sensitive to the political goals of a foreign sovereign; and
(3) The "crucial element" of the court's decision to deny judicial relief under the Act of State Doctrine is "the potential for interference with our foreign relations.[60]

The fundamental assumption made by the court is that the Act of State Doctrine should take precedence over the FSIA. Without this assumption, the court would not have been free to consider the Act of State Doctrine at all.

The court found Congressional intent expressed in two statements made in House Reports; one from the 1973 report by the 93rd Congress on the original version of FSIA,[61] and the other from a footnote in the 1976 report

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57. *Id.* at 1361–62.

58. *Id.*

59. "It has been suggested that the FSIA supersedes the AOSD . . . We disagree." *Id.* at 1359.

60. *Id.* at 1360.

61. "The FSIA 'in no way affects existing law concerning the extent to which the 'AOS' doctrine may be applicable in similar circumstances.'" *Id.* at 1359, *quoting, Immunities of Foreign States: Hearings on H.R. 3493 before the Subcomm. on Claims & Governmental Relations of the Committee on the Judiciary*, 93rd. CONG., 1st SESS. 20 (1973).

accompanying the actual bill.[62] The 1973 statement, however relevant and conclusive it may be, was rendered unauthoritative of Congressional intent by the 1976 House Report. The 1976 Report specifically stated

> The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93rd Congr. 1st Sess.); *the prior analysis should not be consulted in interpreting the current bill and its provisions,* and no inferences should be drawn from differences between the two (emphasis supplied).[63]

The court's use of the 1973 statement, therefore, is a complete deviation from the intention of Congress.

The second statement used by the court to interpret Congressional intent must be read in its original context.[64] The statement is part of a sentence in a footnote to FSIA Section 1605(a)(3).[65] Section 1605(a)(3) unequivocally denies sovereign immunity in cases involving property that is taken in violation of international law. The House Committee was advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the Act of State Doctrine may be improperly asserted in an effort to block litigation. The committee felt, however, that this problem need not be addressed, since the courts had already provided substantial guidance in filtering out invalid Act of State Doctrine defenses. "The committee found it unnecessary to address the Act of State Doctrine in this legislation since decisions such as that in the *Dunhill*[66] case demonstrate that our courts

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62. The court cited to only part of a sentence. The full sentence follows, with the portion cited in IAM v. OPEC in italics: "*The committee has found it unnecessary to address the AOSD in this legislation* since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the AOSD." H.R. REP. No. 1487, 94th CONG., 2d SESS. 20 n.1, *reprinted in,* (1976) U.S. CODE CONG. & AD. NEWS 6619 N.1. *See infra* note 65 and accompanying text.

63. H.R. REP. No. 1487, 94th CONG., 2d SESS. 12, *reprinted in,* (1976) U.S.CODE CONG. & AD. NEWS 6111.

64. *See supra* note 62.

65. 28 U.S.C. § 1605(a)(3).

66. *See supra* note 63 at 6618. Dunhill v. Republic of Cuba, 425 U.S. 682 (1976). In *Dunhill* the respondent government of Cuba claimed that its refusal to pay a commercial debt was not reviewable as an act of state by the Cuban government. The Court rejected this defense because elevating the commercial acts of foreign states to the protected status of an act of state would defeat the purpose of the commercial exception. *See* 425 U.S. at 690–95.

already have considerable guidance enabling them to reject improper assertions of the act of state doctrine."[67]

The court in *IAM v. OPEC* chose to cite only the beginning of the above-quoted sentence. "The committee has found it unnecessary to address the act of state doctrine in this legislation . . ."[68] By thus inaccurately citing to the committee report, the court took the words entirely out of their original context. Such a misquote greatly altered the committee's intended meaning. In fact, the footnote today continues to provide an example of when the Act of State Doctrine would surely not apply. "For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315 (the present bill), whose touchstone is a concept of 'commercial activity'."[69] The committee chose not to address the Act of State Doctrine *not* because, as the court assumes, "Congress recognized the distinction between sovereign immunity and the AOS," [70] but because Congress believed that the Act of State Doctrine would not apply in any case to commercial activities, and that the courts already had provided enough acceptable guidance in "*rejecting improper assertions*" of the Doctrine (emphasis supplied).[71]

In addition to selecting only those words from the House Committee Report which support its holding, the court also disregarded the Congressional purposes of enacting the FSIA. Congress was concerned with the plight of the private litigant. "A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations."[72] The FSIA was to solve this problem by describing "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the U.S. and to provide when a foreign state is entitled to sovereign immunity."[73] To specifically avoid conflicts between the FSIA and the other doctrines, the Act set forth "*the sole and exclusive standards* to be used in resolving questions of sovereign immunity" (emphasis supplied).[74] The intent of Congress, therefore, is as obvious as the Ninth Circuit's disregard for it.

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67. *See supra* note 63 at 6619.
68. *Id.*
69. *Id.*
70. 649 F.2d at 1359.
71. The report went on to say that Congress agreed with the government's *amicus* brief in *Dunhill*, which warned that "to elevate the foreign state's commercial acts to the protected status of an 'Act of State' would frustrate this modern development (of the commercial exception) *by permitting sovereign immunity to reenter through the back door, under the guise of the AOS*" (emphasis supplied). *See supra* note 63 at 6619, *citing, amicus* brief of United States at 41.
72. *Id.* at 6607.
73. *Id.* at 6604.
74. *Id.* at 6610.

USE OF THE FSIA WOULD LEAD TO ADJUDICATION OF IAM'S CLAIM

The Ninth Circuit avoided the FSIA because application of that Act would have forced the court into exercising jurisdiction over an action it believed inappropriate to decide. Since the acts of the OPEC members fall precisely into Section 1605(a)(2) of the FSIA (the commercial activities exception), correct application of the FSIA would have waived the OPEC members' sovereign immunity and allowed the court to decide the merits.

Section 1605(a)(2) specifically excludes immunity for the "commercial activities" of a foreign sovereign. Section 1603(d) defines "commercial activity" and prescribes a method for its determination. "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."[75] The legislative history further refines this definition by specifically excluding any "public purpose" from the consideration. "The fact that goods or services to be procured through a contract *are to be used for a public purpose is irrelevant*; it is the essentially commercial nature of an activity or transaction that is critical" (emphasis supplied).[76]

Applying the FSIA requires a court to remove the political aspects of an activity and examine solely the objective nature of that activity.[77] The objective nature of OPEC's activities can only be viewed as price-fixing; a classically commercial activity.[78]

Even if OPEC's actions should improperly be viewed as regulation of natural resources,[79] they are commercial actions since the legislative history of the FSIA specifically includes mineral extraction companies as commercial enterprises.[80] The actions considered here are not those concerned with a

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75. 28 U.S.C. § 1603(d).

76. *See supra* note 63 at 6615.

77. The Ninth Circuit recognized this requirement and even included a lengthy footnote citing examples. 649 F.2d at 1357 n. 6.

78. Concurrence on this assessment can be found in articles analyzing the district court opinion. *See,* Crocker, *Sovereign Immunity and the Suit against OPEC,* 12 CASE W. RES. J. INT'L L. 215, 227–28 (1980); Burman, *Restrictive Immunity and OPEC,* 8 HOFSTRA L. REV. 771, 791, 806–07 (1980). "[I]f an activity is customarily carried on for profit, its commercial nature could readily be assumed." *See supra* note 63 at 6615. The driving force for price fixing is not, as the court presumes, allocation of resources. Resources can be allocated regardless of their selling price; the sole impetus for price-fixing is profit maximization.

79. Such a categorization is improper, because it includes in its description the purpose of the activity.

80. 28 U.S.C. § 1603(d) defines commercial activity as "a regular course of commercial conduct." The legislative history defines this phrase as "A 'regular course of

single country's decisions on how much oil it will sell; IAM sued on the basis of alleged collusion between many nations. Once the OPEC nations began fixing the price of oil, they were no longer merely regulating their own resources, they were involved in the maximization of profits; an inherently commercial activity.[81]

The test required by Congress also is appropriate because it provides a clear and predictable standard to be applied by both courts and potential litigants. "This approach would clarify legal analysis by assessing the validity of acts of state according to their own legal merits as economic or commercial acts rather than their fleeting association with any political questions that such acts may or may not raise."[82] In addition, if a United States citizen is ever going to find redress in U.S. courts, governmental purposes must be separated from judicial examination because *all* actions, regardless of nature, which involve a foreign sovereign will retain *some* governmental purpose. The declared aim of the FSIA is to "provide when and how parties can maintain a lawsuit against a foreign state."[83] To deny adjudication in all cases where any governmental purpose, no matter how insubstantial, is involved would entirely thwart the goal of this legislation. Such abstention additionally disregards the foremost responsibility of the United States judicial system — to provide an adequate forum in which United States citizens may seek redress.

FUTURE PROBLEMS

In addition to its arbitrary denial of redress to United States citizens, the Ninth Circuit has created a situation with possibly alarming future ramifications. Judge Choy, in deciding to ignore Congress' nature-of-the-act test, refused to apply relevant statutes which apply directly to the IAM case.[84] The task of the court is to apply the law, not to ignore it when it is convenient to do so.[85] The result of allowing such judicial independence is

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commercial conduct' [including] the carrying on of a commercial enterprise *such as a mineral extraction company*" (emphasis supplied). Note 63, *supra* at 6614–15. *See also*, Crocker, *supra* note 78.

81. *See also*, Timberg, *Sovereign Immunity & Act of State Defenses*, 55 TEXAS L. R. 1, 37 (1976).

82. *Id.* at 37. For a full discussion of the benefits of the test for commercial activity, *see, Id.* at 15–16.

83. *See supra* note 63 at 6604.

84. *See supra* note 78.

85. The U.S. Constitution allocates the judicial power: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. CONST. ART. III, § 1. Had

that individual judges will selectively enforce laws by their own preferences, thus defeating the Constitutional goal of democratic rule via a republican form of government.[86] Although this author is not predicting anarchy as a result of the IAM holding, it is valuable to note that this holding does hint at possible Constitutional violations resulting from such judicial abstention.[87]

The "*Sabbatino* balance"[88] also has the potential to improperly encourage judicial abstention. The balance describes a justification for judicial abstention where such justification increases in strength as an issue rises in importance. While this rationale for abstention may be apposite when considering OPEC and the world's oil supply, the idea, without qualification, could become a ready-made excuse to allow courts to avoid a case merely because of its significance. Extension of this idea could lead to cases where an issue becomes *so* important that the court is *compelled* to avoid it.

One cannot ignore, however, the impracticalities of a judicial remedy in the present case. Although Section 1606 of the FSIA requires that foreign states which are not entitled to immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances,"[89] enforcement of injunction orders involving foreign sovereigns can be extremely difficult. Conceivably, the United States could enforce an injunction against OPEC by using economic boycott or armed forces, but such drastic measures would require a major foreign policy decision, most probably not as a result of an injunction ruling from the Ninth Circuit.[90] Perhaps when he decided not to apply the FSIA, Judge Choy was considering the ineffectiveness of such an injunction, while also considering

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the framers of the Constitution intended to make exercise of the judicial power optional, they would have made that intention clear. However, such power was not made optional to the courts. It was vested.

86. The Constitution creates a republican form of government by providing that representatives be elected by the populace. It grants law-making power only to those specifically enumerated. "All Legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. CONST. ART. I, § 1. The legislative history of the FSIA also cites the Constitutional authority which allows Congress to enact the FSIA. *See supra* note 63 at 6611.

87. To date there have been no Supreme Court decisions on the Act of State Doctrine/FSIA conflict.

88. The *Sabbatino* balance is defined as follows: "The less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches (*i.e.*, the weaker the justification for not adjudicating that issue)." 649 F.2d at 1360, *citing*, 549 F.2d at 607, *citing*, *Sabbatino*, 376 U.S. at 428.

89. 28 U.S.C. § 1606.

90. *See* Crocker, *supra* note 78 at 229.

"the possibility of insult to the OPEC states."[91] Because the court could not effectively administer the relief requested, Judge Choy may have opted not to risk insult to the defendants in this situation.

The most troublesome problem with *IAM v. OPEC* may be the lack of specificity in its holding. Vague, general and unqualified opinions are prone to misinterpretation by other courts. By arbitrarily denying redress to United States citizens, the court has shirked its major responsibility, and by not applying the appropriate law, the court steps toward an unconstitutional degree of independence. With its unqualified use of the *Sabbatino* balance, the court implies that a legitimate excuse for abstention becomes stronger with the increase in an issue's importance.

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91. 649 F.2d at 1361.