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An Alternative Justification for Judicial Abstention in Politically Sensitive Disputes Involving Acts of Foreign States

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

Legal disputes involving acts of foreign states[1] have been a source of great judicial tension for many years. The notion that each nation in the international sphere coexists with all others as an equal presents problems of enormous magnitude when United States courts are called upon to adjudicate matters penetrating the sovereign confines of other independent nations. The fear of interrupting the ongoing relationships that the United States maintains with other foreign nations creates an acute sensitivity among domestic courts in dealing with international problems no matter how valid or "domestically oriented" they may be. Devices have emerged to aid the courts in determining when judicial intervention is proper and when abstention is the appropriate course. The inherent difficulty in applying two of the most significant of these devices is revealed in *International Association of Machinists.* The ninth circuit examines the interrelationship of the Foreign Sovereign Immunities Act of 1976[2] and the "act of state" doctrine[3] and attempts to revitalize the latter in its affirmance of the lower court in *International Association of Machinists v. Organization of Petroleum Exporting Countries.*[4]

The suit was commenced in the United States District Court for the Central District of California by the International Association of Machinists and Aerospace Workers (IAM) against the Organization of Petroleum Exporting Countries (OPEC). The complaint alleged that OPEC was engaged in price-setting activities in

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1. The use of the term "states" in this discussion refers to its international usage denoting nations as opposed to the domestic states of the United States.

2. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-1611 (1976) [hereinafter cited as FSIA].

3. Although the "act of state" doctrine has no specific constitutional or statutory source, it has been held to have "constitutional underpinnings." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964).

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

violation of United States antitrust laws.[5] Members of IAM, who work in petroleum-using industries, were disturbed by the high price of oil and petroleum derived products in the United States. They believed OPEC was the cause of this burden and proceeded to sue OPEC and its member nations.

IAM brought suit in December of 1978 alleging price fixing in violation of the Sherman Act,[6] and requested treble damages and injunctive relief pursuant to the Clayton Act.[7] The defendants refused to recognize the court's jurisdiction and failed to appear before the district court. OPEC's cause was argued by various amici, with court appointed experts supplying additional information. The district court ordered a full hearing, noting that the FSIA prohibits the entry of a default judgment against a foreign sovereign "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."[8]

The district court initially dismissed the claim against OPEC, the organization, for lack of proper service. It also determined at the outset that monetary damages were foreclosed by the indirect-purchase rule of *Illinois Brick Co. v. Illinois*.[9] This left only a suit for injunctive relief against the thirteen OPEC nations individually.[10]

The case went to trial in this posture and, after extensive highly complex testimony, the district judge held for the defendants. The court based its decision on (1) a lack of jurisdiction over the foreign nations pursuant to the FSIA, and the fact that (2) even if jurisdiction existed, the antitrust action would fail because foreign sovereigns are not persons within the meaning of the Sherman Act and because no causal connection existed between OPEC's activities and domestic price increases.[11] In addition, the court decided that a default judgment could not lie against the non-appearing defendants and that the defendants had not waived their immunity.[12]

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

6. 15 U.S.C. § 1 (1976).

7. 15 U.S.C. §§ 15, 16 (1976).

8. *Int'l Ass'n of Machinists*, 477 F. Supp. at 575.

9. 431 U.S. 720 (1977) (antitrust laws would be more effectively enforced by allowing recovery only to direct purchasers rather than every plaintiff potentially affected).

10. The following nations comprise OPEC: Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela.

11. *Int'l Ass'n of Machinists*, 477 F. Supp. at 569-70.

12. *Id.* at 574-75.

A key element in the district court's determination that the FSIA granted immunity was its characterization of OPEC's activities as "sovereign" in nature as opposed to commercial.[13] The significance of this determination lies in the exceptions to sovereign immunity provided for in the Act. Under 28 U.S.C. § 1605(a)(2), a foreign nation engaged in commercial activity in the United States is not immune from suit based upon that activity.[14]

The categorization of activity as commercial or non-commercial has been a source of great controversy.[15] Two tests have emerged, each focusing on a different aspect of the activity. One test concentrates on the purpose of the activity, the other, on the nature of the activity. The purpose test provides for greater immunity in that it is a subjective test which looks to the underlying governmental purpose. The nature test, on the other hand, is more narrow in that it is objective and focuses upon the nature of the act itself.[16]

IAM argued to the ninth circuit that the lower court improperly characterized the activities of OPEC and its member nations as sovereign and that no immunity should have existed as provided for in the exceptions to the Act. Specifically, IAM claimed that the district court's analysis "strayed from the path set forth in the FSIA."[17] It suggested that the act itself rather than the underlying sovereign motivations is the proper focus for the inquiry.[18]

The circuit court, alluding to the fact that "decisions about oil are the essence of sovereignty to the OPEC nations,"[19] affirmed the dismissal while circumventing the issue of sovereign immunity under the FSIA. It accomplished this by affirming on the alternative ground—the act of state doctrine.[20]

The court's mention of sovereignty in regard to the OPEC nations raises a serious question when considered with the fact that the FSIA was found not to apply. If the activity of OPEC and its

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13. *Id.* at 567.

14. 28 U.S.C. § 1605(a)(2) states: "(a) A foreign state shall not be immune from the jurisdictions 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. . . ."

15. *Int'l Ass'n of Machinists*, 649 F.2d at 1357.

16. *Id.*

17. *Id.* at 1358.

18. *Id.*

19. *Id.*

20. *Id.* at 1361.

member nations was not commercial, but instead, was "sovereign" in nature, why did the court fail to simply apply the FSIA and find sovereign immunity? The ninth circuit, in an apparent effort to move cautiously and to avoid interference with an international relationship involving one of the world's most precious commodities, opted for a safer alternative. The act of state doctrine permitted the court to find that the dismissal was proper without addressing the problematic issue of whether OPEC's activities were sufficiently commercial to require judicial action in this extremely sensitive area. The effect of the court's reliance on the act of state doctrine is that the doctrine has been revitalized following a period of doubt regarding its effectiveness since the enactment of the FSIA in 1976.

The act of state doctrine was expressed by the Supreme Court as early as 1897 in *Underhill v. Hernandez*,[21] where the Court stated:

> 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.[22]

The notion that courts must perceive their limitations when operating in the international community is a concept which employs prudential considerations as opposed to technical considerations of jurisdiction. It is a doctrine which involves "respect" for the sovereignty of other nations and lends itself to changing interpretations based on the particular facts and degree of sensitivity in a given case. The ninth circuit juxtaposes the act of state doctrine with the political question doctrine in domestic law. It reasons that both doctrines require the courts to defer to the legislative and executive branches when those branches are better equipped to resolve a sensitive question.

The act of state doctrine was again recognized by the Supreme Court in *Ricaud v. American Metal Co.*,[23] where the Court distinguished between the law of sovereign immunity and the act of state doctrine. It determined that the law of sovereign immunity goes to the jurisdiction of the court, whereas, the act of state doc-

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21. 168 U.S. 250 (1897).
22. *Id.* at 252, *quoted in Int'l Ass'n of Machinists*, 649 F.2d at 1358.
23. 246 U.S. 304 (1918).

trine is not jurisdictional.[24] Acknowledging the doctrine's constitutional underpinnings, the Supreme Court, in *Banco Nacional de Cuba v. Sabbatino*[25] stated the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers. . . ."[26]

It is abundantly clear that the act of state doctrine was alive and functioning until the enactment of the FSIA in 1976. With the advent of the FSIA, however, uncertainty developed regarding the survival of this historical doctrine which claims no constitutional or statutory source. In fact, *Alfred Dunhill of London, Inc. v. Cuba*,[27] raised the question of whether the act of state doctrine is viable subsequent to the adoption of the FSIA.[28] Although the question was not resolved, recent decisions, most significantly, *International Association of Machinists*, indicate that the act of state doctrine can and, in fact, does coexist with the FSIA in the sphere of international litigation.

The independent nature of the doctrine was pointed out in *Timberlane Lumber Co. v. Bank of America*,[29] where it was determined that the act of state doctrine could be raised by a private litigant, even where no sovereign state is a party to the action.[30] The FSIA, which goes to jurisdiction, can only be raised by a sovereign nation.[31]

The real significance in the application of the act of state doctrine in *International Association of Machinists* is revealed in the court's assertion that "[t]he act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity."[32] This notion permitted the court to accomplish the same end that could have been achieved via the FSIA without making a commitment one way or another on the problematic issue of characterizing the activities of OPEC as commercial or sovereign in nature. A finding that the activity was commercial would have extinguished the immunity under the FSIA and would have required judicial intervention into one of the most delicate areas in

24. *Id.* at 309.
25. 376 U.S. 398 (1964).
26. *Id.* at 423.
27. 425 U.S. 682 (1976).
28. *Id.* at 705, 705 n.18.
29. 549 F.2d 597 (9th Cir. 1976).
30. *Id.* at 606.
31. 28 U.S.C. § 1602 (1976).
32. *Int'l Ass'n of Machinists*, 649 F.2d at 1360.

international relations. A determination that such an act was sovereign in nature would have placed unnecessary ammunition in the hands of OPEC and its member nations giving them a windfall in the political arena which certainly was uncalled for in light of the tremendous power OPEC already possessed.

The ninth circuit, therefore, was able to completely avoid entering the political arena by invoking the act of state doctrine in *International Association of Machinists.* This common law notion, that United States courts will not adjudicate politically sensitive disputes involving acts of foreign states, which surfaced in *Underhill, Ricaud, Sabbatino,* and *Timberlane,* prevails notwithstanding the enactment of the FSIA. *International Association of Machinists* demonstrates a significant application of the doctrine in matters where foreign state activity is commercial in nature and judicial intervention is inadvisable. Without having to decide whether the sovereign's activities were commercial or sovereign in nature, the court was able to abstain relying solely on the act of state doctrine. Although the FSIA clearly has continuing vitality in sensitive matters which concern national sovereignty in the international community, the act of state doctrine can coexist in that same sphere and offer an effective and meaningful alternative.

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