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Sovereign Immunity and the Suit Against OPEC*

by Lawrence Crocker**

I. INTRODUCTION

THERE IS WIDESPREAD belief that the inflation and balance of payment problems facing the American economy are the result, in large measure, of the machinations of the Organization of Petroleum Exporting Countries (OPEC).¹ OPEC openly fixes prices, and price fixing is, if engaged in by domestic American firms, a *per se* violation of section 1 of the Sherman Antitrust Act.² Considering these facts together, it was no doubt to be expected that someone would attempt to turn antitrust law against OPEC by bringing suit under section 4 of the Clayton Act for treble damages³ and under section 6 of that act for an injunction against the price fixing.⁴

The plaintiff that stepped forward was the International Association of Machinists (IAM)—a union whose leadership has a reputation for lib-

* International Ass'n of Machinists and Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979) [hereinafter cited as IAM v. OPEC].

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*** A condensed version of this comment is forthcoming in the INT'L AND COMP. L.Q. under the title *The Suit Against OPEC: Foreign Sovereign Immunity in the United States*.

¹ OPEC had its origins in a 1960 meeting of representatives of Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. The organization now also includes Algeria, Ecuador, Gabon, Indonesia, Libya, Nigeria, Qatar, and United Arab Emirates. These nations, as well as OPEC, were named as defendants in the suit.

OPEC's dramatic influence on the world oil economy began with a cut in production in 1972-73 and the embargo of the United States in 1973. "OPEC countries then quadrupled their crude oil prices and accelerated the nationalization of oil operations." A. EZATI, *WORLD ENERGY MARKETS AND OPEC STABILITY* (i) (1978).

² Section 1 of the Sherman Act provides that: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared illegal." 15 U.S.C. § 1 (1976). The section continues, classifying the conduct as a felony and setting maximum penalties.

³ Section 4 provides in pertinent part that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained . . ." 15 U.S.C. § 15 (1976).

⁴ Section 6 provides in pertinent part that "[a]ny 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 . . ." 15 U.S.C. § 26 (1976).

eralism and which frequently exerts itself on issues that go well beyond narrow trade union concerns. But the IAM stood far from alone with respect to this suit. Appearances were made or briefs filed urging the granting of an injunction against OPEC or urging the court to retain jurisdiction of the case by six *amicus curiae*, including two United States Congresspersons.⁵ A joint memorandum urging the court not to dismiss the case was submitted by the attorneys general of seventeen states.

Despite its political popularity, however, and despite the fact that domestic price fixing is a *per se* antitrust violation, the suit, in the end, can only be regarded as quixotic. It was dismissed by District Court Judge Hauk, and insofar as that dismissal was predicated on sovereign immunity it was inevitable and correct. While the result of the case is, in the final analysis, difficult to take exception to, a consideration of the details of the opinion is revealing both for the light it sheds on the general question of the amenability to suit of foreign governments under the Foreign Sovereign Immunity Act of 1976⁶ (FSIA) and the specific question of the amenability of foreign governments to suit under the antitrust laws of the United States.

This paper will first sketch the major arguments of the opinion. It will then criticize the opinion in the course of outlining a strategy to be pursued if one were assigned the task of winning an antitrust suit against OPEC. The final part of the paper will argue that, despite the technical imperfections of the opinion, and despite the fact that the plaintiff's case, properly prosecuted, would have had much to recommend it, the court was nonetheless correct in holding that it lacked jurisdiction to adjudicate an antitrust suit against OPEC.

II. THE OPINION

Judge Hauk's opinion is divided into seven parts, including an introduction and conclusion. The first, third, and fourth parts deal with antitrust doctrine, while the introduction, second, and fifth parts raise issues of international law—primarily under FSIA. While conceptual economy would be served by discussing all the antitrust issues together, followed

⁵ *Amicus curiae* included the Washington Legal Foundation, Public Advocates, Inc. of San Francisco, American-G.I. Forum, Gulf and Western Industries, the Attorney General's Office of the State of Connecticut, and Congressman Jim Leach with general agreement by Congressman Tom Railsback.

⁶ 90 Stat. 2891, 28 U.S.C. §§ 1330, 1602-11 (1976) (amending 28 U.S.C. §§ 1391, 1441). Its date of enactment was October 21, 1976. *See generally*, Grzybowski, *The United States Foreign Sovereign Immunities Act 1976*, 1978 J. BUS. L. 111; von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978).

by a discussion of the international issues, this Comment will follow the order of the opinion to avoid obscuring the overall structure of Judge Hauk's argument.

Before getting into the substance of the opinion, it is important to take note of the fact that none of the defendants made an appearance, either special or general, at the hearing. This significantly affected the procedural posture of the case, especially the possibility of default. Appearances were made on behalf of two *amicus curiae*⁷ urging dismissal.

A. Introduction

The introduction was not limited to routine stage setting. It also dismissed OPEC itself from the suit—leaving as defendants the thirteen member states of that organization. OPEC is not a sovereign, and so jurisdiction over OPEC could not be obtained under the long-arm section of the FSIA.⁸ Neither could jurisdiction over OPEC be obtained under the International Organizations Immunities Act⁹ since that act applies only to organizations of which the United States is a member and other named organizations. The court speculated that there was no means by which process could validly be served on OPEC, but the issue was stipulated out of the case by the plaintiff's admission "that OPEC could not be and had not been legally served."¹⁰

B. Plaintiff as 'Indirect Purchaser'

The first contested issues dealt with by the opinion were antitrust issues arising under the doctrine of *Illinois Brick Co. v. Illinois*.¹¹ *Illinois Brick* stands for the proposition that the plaintiff in a price fixing case can recover damages only if it purchased directly from the price fixer. The court found that "plaintiff was and is at the very best an indirect purchaser, eight times removed from the defendants."¹²

The court refused to find that any of three possible exceptions to the *Illinois Brick* doctrine applied. Plaintiff failed to prove (1) that defendants controlled the United States oil companies from which plaintiff bought gasoline, (2) that those oil companies conspired with the defendants to fix prices, or (3) that 15 U.S.C. § 753(b)(2), permitting a pass

⁷ These were the Concerned Black Americans in Support of Africa and the Middle East, and the U.S. Business Committee of the Indonesian Chamber of Commerce and Industry.

⁸ See 28 U.S.C. §§ 1602-04 (1976).

⁹ 22 U.S.C. §§ 288-288i (1976).

¹⁰ *IAM v. OPEC*, 477 F. Supp. at 560.

¹¹ 431 U.S. 720 (1977).

¹² *IAM v. OPEC*, 477 F. Supp. at 561.

through of crude oil price increases, brought the case within the "cost-plus contract" exception to *Illinois Brick*.¹³

Since the action in *Illinois Brick* was for damages only, it left undecided the question whether a direct purchase test is to be applied in a suit for an injunction. This question has not been answered by subsequent Supreme Court cases. Following the Third Circuit's recent decision in *Mid-West Paper Products Co. v. Continental Group, Inc.*,¹⁴ Judge Hauk held that the *Illinois Brick* doctrine should not be extended to bar an injunction sought by an indirect purchaser. A suit for an injunction, Judge Hauk argued, involves few of the problems that the *Illinois Brick* Court referred to in denying a damage action to the indirect purchaser. There would be no problem of apportioning recovery funds. Since one injunction is as good as one hundred, there would be no multiplicity of suits. And joinder and evidentiary problems would be less complicated.

In view of the desire of Congress for effective enforcement procedures under the antitrust law, this Court does not believe that Congress intended to totally exclude such a large class of potential plaintiffs from the protection of the antitrust laws. Accordingly, this Court . . . concludes that an indirect purchaser may sue for injunctive relief under the antitrust laws.¹⁵

Thus plaintiff prevailed on one major unsettled point of antitrust law. The injunctive suit's clearing of the *Illinois Brick* hurdle was, however, the last good news the plaintiff was to receive. All remaining issues were decided in favor of the absent defendants.

C. Jurisdiction

The heart of the decision was the finding that courts of the United States lack jurisdiction to adjudicate an antitrust case against members of OPEC. The court found a failure of both subject matter and personal jurisdiction. Sovereign immunity is given explicit jurisdictional significance under FSIA, 28 U.S.C. § 1330. Therefore the court may consider the question of sovereign immunity *sua sponte* in ascertaining its own jurisdiction.¹⁶

The FSIA, 28 U.S.C. § 1604 provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be

¹³ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732 n.12 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

¹⁴ 596 F.2d 573 (3d Cir. 1979).

¹⁵ *IAM v. OPEC*, 477 F. Supp. at 564.

¹⁶ See note 22 and text accompanying notes 40-41 *infra* for an examination of the justification of the court's considering sovereign immunity *sua sponte*.

immune from the jurisdiction of the courts of the United States and the States except as provided in sections 1605 to 1607 of this chapter.

As the court noted, the exception which is possibly applicable to the case is found in 28 U.S.C. § 1605(a)(2) which excepts from immunity action

. . . 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.

Since the last clause might apply if OPEC's price fixing was "in connection with a commercial activity," the opinion turned to the issue of whether the activities engaged in by the defendants were "commercial." This was the key issue of the case.

Largely through the testimony of court appointed experts in oil economics, the court established that the OPEC members' activities are non-commercial for the purposes of the FSIA. Judge Hauk argued that the commercial activity exception should be construed narrowly "guided by the legislative intent of the FSIA, to keep our courts away from those areas that touch very closely upon the sensitive nerves of foreign countries."¹⁷ Drawing on the testimony of the expert witnesses, the court concluded that "the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource—to wit, crude oil—from its territory."¹⁸ The opinion did not draw the inference that such activity amounted to a "sensitive nerve" but that is the implication, and it is surely a natural one.

Judge Hauk argued further that international agreements establishing the right of each nation to control its own resources entail that the activities of the OPEC states are sovereign, rather than commercial.

Judge Hauk then considered domestic activities involving California's treatment of raisins¹⁹ and state and federal treatment of oil,²⁰ and found therein confirmation of his view that the control of resources, even if connected with price fixing, is a sovereign activity.²¹

The court concluded that:

. . . the activity carried on by the defendant OPEC member nations is *not* "commercial activity;" that, therefore, defendants are entitled to im-

¹⁷ *IAM v. OPEC*, 477 F. Supp. at 567.

¹⁸ *Id.*

¹⁹ *Parker v. Brown*, 317 U.S. 341 (1943).

²⁰ See *IAM v. OPEC*, 477 F. Supp. at 568.

²¹ *Id.*

munity under 28 U.S.C. § 1604; and that, consequently, this Court lacks subject matter jurisdiction under 28 U.S.C. § 1330(a).

And, since this Court lacks subject matter jurisdiction, it also lacks personal jurisdiction, as mandated by 28 U.S.C. § 1330(b).²²

D. *Foreign Sovereign Cannot Be Defendant in Antitrust Action*

Section 1 of the Sherman Act declares that every "person" who engages in the forbidden activity is guilty of a felony. Section 8 of the Sherman Act²³ and section 1 of the Clayton Act²⁴ define "person" to "include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Judge Hauk argued that this statutory language excluded foreign states from the "persons" who could be liable under the antitrust laws. He relied upon *Parker v. Brown*,²⁵ the well known 1943 case in which the Supreme Court held that domestic states could not be antitrust defendants. In *Hunt v. Mobil Oil Co.*²⁶ the Second Circuit expressed, in dictum, that "Libya cannot be guilty of a Sherman Act violation . . . because it is not a person or a corporation within the terms of the Act but a sovereign state."²⁷

Finally Judge Hauk declared himself to be bound by a *stare decisis* precedent by language in an opinion of a federal district court in Delaware: "The Sherman Act refers only to persons not to states or nations."²⁸

²² *IAM v. OPEC*, 477 F. Supp. at 569. However, note that 28 U.S.C. § 1330(a) is not the only grant of subject matter jurisdiction that might be relied upon in a suit against a foreign state. Jurisdiction is arguably granted under § 1331 (general federal question jurisdiction) or under such specific jurisdictional statutes as 15 U.S.C. § 4 (1976) (antitrust jurisdiction).

If FSIA § 1604 is to be read as withdrawing subject matter jurisdiction, then Judge Hauk's analysis is essentially correct. But traditionally sovereign immunity was seen as involving relinquishment of jurisdiction—parallel to the doctrine of abstention. There was thought to be no absence of judicial power as understood under the concept of subject matter jurisdiction. See *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). There is no indication in the legislative history that the FSIA was intended to alter sovereign immunity in this respect. It remains true that sovereign immunity, unlike a defect in subject matter jurisdiction, can be waived by the defendant. Moreover, the House Report states that sovereign immunity is an affirmative defense. See notes 40-41 *infra* and accompanying text.

A better justification for the right and duty of the court to raise sovereign immunity *sua sponte* is found in the anti-default clause of the FSIA, 28 U.S.C. § 1608(e) (1976). See text accompanying notes 40-41 *infra*.

²³ 15 U.S.C. § 7 (1976).

²⁴ 15 U.S.C. § 12 (1976).

²⁵ 317 U.S. 341 (1943).

²⁶ 550 F.2d 68 (2d Cir. 1977).

²⁷ *Id.* at 78, n.14.

²⁸ *Interamerican Refining Corp. v. Texaco Maricaibo, Inc.*, 307 F. Supp. 1291, 1298 n.18 (D. Del. 1970).

The court was unmoved by the fact that the 1978 decision of the Supreme Court in *Pfizer Inc. v. India*²⁹ held that foreign sovereigns do count as "persons" for the antitrust laws when the question is who may be a plaintiff. In distinguishing *Pfizer* Judge Hauk noted that the foreign policy considerations involved in giving a foreign state status as plaintiff are very different from those involved when the foreign state is a defendant.

Thus Judge Hauk found, in addition to sovereign immunity under the FSIA, a second independent ground for dismissing the case against the OPEC members. As foreign states they cannot be antitrust defendants under the terms and policies of the antitrust laws.

E. *No Proximate Cause, No Injunctive Relief*

The court found yet a third alternative ground for dismissing the suit. Plaintiff had failed to prove a direct causal connection between OPEC's activities and the rise in gasoline prices at the American gas pump. Therefore no injunction could issue, under traditional equitable doctrine.

Judge Hauk blamed the rise in gasoline prices largely on United States government regulation and concluded that ". . . the rise in OPEC crude oil prices was not a substantial factor in the rise of domestic gasoline prices."³⁰

F. *No Default Judgment and No Waiver*

The FSIA, 28 U.S.C. § 1608(e) provides that:

No judgment by default shall be entered by a Court of the United States or of a State against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the Court.

Judge Hauk interpreted this statute to mean that the court must hold a full hearing even if the foreign state fails to make an appearance after being properly served and that all the defenses discussed above may be entertained at that hearing. Since the defenses were held to be valid, no default judgment could issue.

III. THE CASE FOR RELIEF

A. *Against OPEC*

In the apparent absence of an applicable long-arm statute, it will not

²⁹ 434 U.S. 308 (1978).

³⁰ *IAM v. OPEC*, 477 F. Supp. at 574.

be possible to obtain personal jurisdiction over OPEC as an organization unless it is "present" in the United States. Perhaps some such presence can be found, but it is not at all obvious that OPEC's contacts with this country are sufficiently direct to constitute presence. Therefore the court was probably correct in dismissing OPEC from the case on this ground.

It is worth noting, however, that if personal jurisdiction could be obtained over OPEC, there would be fewer remaining obstacles to relief than there are with respect to the member states. Since OPEC is not a state, it can claim no immunity under the FSIA. Moreover, it is an "association," and, arguably, one created under the laws of foreign states. Therefore it would not be automatically disqualified as an antitrust defendant. There would remain, of course, the *Illinois Brick* problem with respect to damages and the proximate cause issue with respect to injunctive relief.

B. *The Antitrust Issues*

Since the chief concern of this paper is the issue of sovereign immunity, the antitrust issues will not be considered in detail; but a litigation strategy, to have any hope of success against the OPEC countries, would have to give considerable attention to the antitrust issues. There would, in fact, be a significant chance for a plaintiff to prevail on the key antitrust issues in a properly conducted suit.

It will be useful to divide the antitrust issues into two divisions—the issues that should be won on the facts and the issues that should be won on the law. Facts are crucial to recovery of damages since it must be shown that one of the exceptions to the *Illinois Brick* rule obtains. Most plausible is the possibility of a conspiracy between OPEC and the oil companies. Such a conspiracy, in effect, brings the plaintiffs into the position of direct purchasers. One can surmise that in the contracts and communications between the oil companies and the OPEC members, including their proprietary companies, there could be found some evidence tending to support a conspiracy. A conspiracy might also be inferred from careful analysis of price movements within the world oil market. The same or closely related facts would be useful to show that OPEC's price fixing has a proximate effect on the price at the American gas pump.

There is reason to believe that the OPEC countries would refuse to submit to the extensive discovery that would be required to deal with the factual antitrust issues. Their refusal to submit to discovery might, however, be turned against them. Section 1608(e) of the FSIA requires that the claim for relief be established. But the House Report makes it clear that "[i]n determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the

foreign state.”³¹ That the intent is to lighten plaintiff’s factual burden when defendants refuse discovery is made clear by reference³² to Rule 37 of the Federal Rules of Civil Procedure which provides sanctions as harsh as establishment of facts against the party refusing discovery³³ and even default.³⁴ The discovery would have to be “appropriate” and steer clear of “sensitive governmental documents,”³⁵ but it is doubtful that a court could rule out discovery relating to a conspiracy with the oil companies.

Thus if a *prima facie* showing can be made with evidence otherwise available, the plaintiff might prevail under section 1608(e) if defendants refuse to submit to discovery, and facts which discovery might plausibly turn up would complete plaintiff’s proof of an issue. It is hard to believe that serious factual research could not establish a *prima facie* case on the proximate effect at the gas pump issue. It is not unlikely that it could be established on the *Illinois Brick* conspiracy issue as well.

The doctrinal antitrust proposition that plaintiffs must establish is that foreign states can be antitrust defendants. This issue can be won. As a matter of *antitrust* law, the OPEC members should be suable. This is not to say that it should be possible to sue foreign states for antitrust violations in all cases. In the end it should not be possible to sue the OPEC states for price fixing. (See part IV *infra*). But this is so not by virtue of antitrust law but but by virtue of the FSIA.

The argument that the definitions in the antitrust laws exclude foreign state defendants because they are neither “corporations” nor “associations” can no longer be made after *Pfizer*. The definition of “person” in Clayton Act section 1 defines the term for both plaintiffs and defendants. The *Pfizer* Court found that definition compatible with a foreign state’s being a person. Therefore that definition cannot foreclose the possibility that foreign states can be antitrust defendants.

The more persuasive argument that foreign states cannot be antitrust defendants looks to the language of *Pfizer* to the effect that permitting foreign states to be antitrust plaintiffs does not “require the judiciary in any way to interfere in sensitive matters of foreign policy.”³⁶ Judge Hauk quoted this language, then continued, “[t]o include foreign nations within the ambit of “persons” who may be sued as defendants, however, would require judicial interference in sensitive foreign policy matters.”³⁷ And in

³¹ H.R. REP. No. 1487, 94th Cong., 2d Sess., 12 (1976), [1976] U.S. CODE CONG. & AD. NEWS 6604, 6625.

³² *Id.* at 6621, 6625 n. 3.

³³ FED. R. CIV. P. 37(b)(2)(A).

³⁴ *Id.* at 37(b)(2)(B).

³⁵ H.R. REP. No. 1487, *supra* note 31, at [1976] U.S. CODE CONG. & AD. NEWS 6621.

³⁶ 434 U.S. at 319.

³⁷ *IAM v. OPEC*, 477 F. Supp. at 572.

a footnote:

Giving a foreign sovereign the *option* to sue, merely allows the nation to use our judicial system if it wishes. Allowing foreign sovereigns to be sued, however, would *require* their presence in our courts. Thus the latter poses the greater threat to sensitive matters of foreign policy.³⁸

This consideration is obviously of the first level of importance. Just as obviously it is a matter that goes right to the heart of the rationale of the FSIA. The "sensitive matters of foreign policy" involved in requiring the presence of foreign sovereigns in our courts are precisely the motivation behind sovereign immunity. But the FSIA purports to set "the sole and exclusive standards to be used in resolving questions of sovereign immunity."³⁹ Those standards, embodying the restrictive theory of sovereign immunity, distinguish between commercial and governmental activity. To interpret the antitrust laws to exclude foreign state defendants engaged in commercial activity on the basis of "sensitive matters of foreign policy" would be to defy Congress' clear mandate in the FSIA.

Finally a quick look should be taken at the precedents under which Judge Hauk felt himself to be bound to find that foreign states cannot be antitrust defendants. It may be noted first that Judge Hauk had a very broad notion of *stare decisis* to think that a federal district court in California could be bound by the decision of a federal district court in Delaware. Under more traditional notions a court is bound only by its own past decisions and the decisions of courts to which its judgments may be appealed. Moreover, in none of the cases cited by Judge Hauk was a foreign state a defendant. Therefore technically none of those cases held that a foreign state cannot be an antitrust defendant. A court is not bound by dicta.

Thus the question whether a foreign state can be an antitrust defendant is not settled either by the language of the antitrust acts or by the case law. Under the terms of the FSIA the foreign policy implications of this question are to be considered not under the antitrust laws guided by judicial intuitions about foreign policy, but under the guidelines set out by the FSIA. Therefore the second of Judge Hauk's three alternative grounds for dismissal of the suit against the OPEC members reduces to the first—turning on jurisdiction under the FSIA.

C. *The Sovereign Immunity Issues*

1. Affirmative Defense and Default.

Judge Hauk agreed that the FSIA makes sovereign immunity a mat-

³⁸ *Id.* at n.18.

³⁹ H.R. REP. No. 1487, *supra* note 31, at [1976] U.S. CODE CONG. & AD. NEWS 6610.

ter of subject matter jurisdiction, which can, therefore, be raised *sua sponte*. However, there is an argument, drawing on the legislative history, that sovereign immunity must be affirmatively asserted if it is to be used as a defense against default.

[S]ince sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such *prima facie* evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.⁴⁰

This language by itself would strongly suggest that a defendant who failed to make an appearance could not be saved from default by sovereign immunity. The burdens of pleading, going forward, and persuasion all rest on the defendant. Arguably, the defendant, in failing to appear, must fail to carry all three burdens.

This line of argument, however, is in apparent conflict with FSIA section 1608(e).

No judgment by default shall be entered by a Court of the United States or of a State against a foreign state . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.⁴¹

If there is a conflict between the legislative history and the statutory language, the latter, of course, governs. Presumably, however, the two can be harmonized. There are three main possibilities:

- (1) § 1608(e) requires the plaintiff to prove only those issues on which the plaintiff bears the burdens of going forward and persuasion. The plaintiff may win other issues by default.
- (2) When the defendant makes no appearance, the court may raise the issue of sovereign immunity *sua sponte*. The burden of going forward is met if the evidence before the court (by whomever produced) constitutes a *prima facie* case. Similarly, the burden of persuasion is met if that evidence meets the preponderance standard. The judge is permitted to require the production of the necessary evidence.
- (3) The language from the House Report has relevance only where the defendant makes an appearance. Otherwise the burdens of going forward and of persuasion on the sovereign immunity issue rest with the plaintiff.

⁴⁰ *Id.* at 6616.

⁴¹ 28 U.S.C. § 1608(e) (1976).

A plaintiff might put forth alternative (1). It fits well with the passage quoted from the House Report. However, it fits very poorly with the underlying purposes of the FSIA. It is precisely in those cases that are most offensive to the sovereignty of the foreign state that it is unlikely to "dignify the proceedings" with an appearance. It would turn the FSIA on its head to interpret the Act as requiring that the foreign state lose its immunity under such circumstances.

However, interpretation (3) permits the foreign state to shift burdens to the plaintiff by the simple expedient of making no appearance. Since a purpose of the Act was to bring defendants, not protected by sovereign immunity as restrictively understood, into United States courts, Congress presumably had no intention of making it easier for the foreign state to prevail on sovereign immunity by nonappearance than by appearance.

This leaves interpretation (2) as the most plausible way of harmonizing the legislative history with section 1608(e). It is true that (2) is, on first blush, a little awkward in requiring the neutral court to take a fairly active role as "substitute" for the defendant. But reflection suggests that this is an inevitable consequence of the basic idea of section 1608(e), under which the court must reach the merits of the case without the participation of the defendant.

Judge Hawk's treatment of the sovereign immunity issues arguably comports with interpretation (2). The court implicitly found that the facts available met the defendants' burdens of going forward and of persuasion.

It appears, then, that no quick victory for plaintiffs can be anticipated through the use of an "affirmative defense—default" argument on sovereign immunity. However, keeping interpretation (2) and its distribution of burdens in mind might be of use to plaintiffs who seek to litigate the issue of commercial activity.

2. Commercial activity.

The key to winning an antitrust suit against the members of OPEC would be to establish that their activity in setting oil prices is commercial in nature. There are plausible arguments to this effect, starting with the observation that setting the price at which a commodity will be sold on the world market, largely to private buyers, is surely a *prima facie* commercial activity.

Moreover there is explicit language in the legislative history that reinforces this conclusion.

A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline

or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."⁴²

Since the OPEC members are typically at least part owners of the wells and distribution facilities, "agencies" or "instrumentalities" of the foreign states are "mineral extraction companies." If this explicit inclusion within the commercial category were not enough, it is probably safe to conclude that the production and sale of oil is an activity "customarily carried on for profit."

The court took note of the "mineral extraction companies" language in the legislative history, but relied on a theory that the essential nature of the OPEC states' activity is not the fixing of prices of sale by mineral extractive companies, but rather the regulation of the crude oil resource. Indeed the price fixing itself is only made possible by the policy of the restriction of the supply of oil.⁴³

What this comes down to is an argument that, since the underlying purpose of the price fixing—the husbanding of resources—is non-commercial in motivation, the price fixing itself should not fall within the commercial exception to sovereign immunity.

It is worth examining Judge Hauk's contention that the underlying activity is, in fact, non-commercial. Certainly the restriction of supply to achieve a monopoly profit is an ordinary commercial technique that seems clearly to fit within the language of the House Report. Is the regulation of resources anything more than maximizing the long run profit to be derived from the resource? Perhaps the willingness of OPEC members to use oil embargoes for military and political purposes shows that there is more going on here than long term profit maximization, but it would be interesting to see if it could be demonstrated that the general policies underlying the participation of each state in OPEC lead to behavior significantly different from what would be expected from a private owner of the same resource.

However, even if it is granted that the "underlying" purpose behind OPEC price fixing is a non-commercial one, Judge Hauk's argument still has difficulties. The legislative history distinguishes between the purpose of an activity and the activity itself, as indicated in the House Report's discussion of contracts.

[T]he 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

⁴² H.R. REP. NO. 1487, *supra* note 31, at [1976] U.S. CODE CONG. & AD. NEWS 6614-15.

⁴³ IAM v. OPEC, 477 F. Supp. at 567.

nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. . . . Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.⁴⁴

The paradigmatic sovereign activity is the maintenance of armed forces. If the making of contracts for the purpose of maintaining armed forces is commercial, so, it can be argued, is the fixing of prices of sale on the market for the purpose of regulating resources. Therefore Judge Hauk's demonstration that international law recognizes control over resources as a sovereign activity⁴⁵ is largely beside the point. Commercial activities stemming from sovereign purpose are nonetheless commercial.

The preferred strategy for winning this point in court would probably not be to make it in logical abstraction, but rather to embed it in a factual demonstration of the commercial nature of OPEC activities. This would largely overlap with the factual showing necessary under the anti-trust issues. In particular there is a requirement included in the key third clause of the commercial exception that there be a direct effect on the United States. Commercial activity without direct effect is not sufficient.⁴⁶ Presumably this proof would parallel that required to justify the use of an injunction.⁴⁷

Discovery against the OPEC members would focus on their agreements, contracts, and proprietary interests. If this discovery were refused, the sanctions of section 1608(e)⁴⁸ could, again, be turned to good effect by the plaintiff. In any event, a heavily factual approach, with significant discovery requests, would make it more difficult for the court to conclude that absent defendants have satisfied their burden of persuasion⁴⁹ on the sovereign immunity issue.

3. Waiver of Immunity in Treaties.

FSIA section 1604 contains an exception to immunity if a waiver was incorporated in a treaty.

Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune

A district court has found that immunity to prejudgment attachment

⁴⁴ H.R. REP. NO. 1487, *supra* note 31, at [1976] U.S. CODE CONG. & AD. NEWS, 6615.

⁴⁵ *IAM v. OPEC*, 477 F. Supp. at 567.

⁴⁶ *Carey v. Nat'l Oil Corp.*, 592 F.2d 673 (2d Cir. 1978).

⁴⁷ See text preceding note 31 *supra*.

⁴⁸ See notes 31-34 *supra* and accompanying text.

⁴⁹ See notes 40-41 *supra* and accompanying text.

under section 1608 was waived by the Iran-United States Amity Treaty.⁵⁰ The opposite conclusion, however, was reached by a second district court.⁵¹ There does not seem to be language in any other amity treaties with OPEC states in effect in 1976 that constitutes a plausible waiver of section 1604 immunity.

IV. THE CASE WAS RIGHTLY DECIDED

As emerges from the above discussion, the court's arguments in the OPEC case are flawed on a number of points. A concentration on the details of the legislative history of the FSIA suggests that OPEC's price fixing is a commercial activity and, therefore, that sovereign immunity should not be available.

However, that should not, in fact, have been the outcome of the case. However clumsily Judge Hauk may have handled some of the details, his instincts were correct. The suit against OPEC is just the sort of case for which Congress must have intended there to be sovereign immunity. To see why this is so it is only necessary to consider what would have happened if the IAM had won the suit. The court would then have issued an injunction to Libya, Saudi Arabia, Venezuela, and the ten other states forbidding them from conspiring to fix prices. It is conceivable that this injunction could be enforced if the United States were willing to make full use of its military power, and assuming that nuclear war did not intervene to make the whole matter academic. In short, to say that a suit against the members of OPEC for price fixing intrudes into a sensitive foreign policy area is a masterpiece of understatement.

The FSIA was intended to codify a restrictive theory of sovereign immunity, but not a theory which had severed all relation to the purpose behind sovereign immunity in the first place. That underlying purpose is to insure that clashes of major policies between different nations take place in the diplomatic arena rather than the courts of one or another country.

Unfortunately the commercial-governmental distinction in the FSIA and its legislative history is not an ideal instrument for accomplishing this purpose. It fails to take into account the importance of the activity to the national economy and the extent to which the foreign nation identifies the activity with its national policy. Price fixing of a commodity on the world market is, from the standpoint of common sense and the explicit language of the legislative history, a commercial activity. But for the purposes of the FSIA it must be held to be "non-commercial" in this

⁵⁰ *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383, 390 (C.D.N.J. 1979).

⁵¹ *Reading & Bates Corp. v. Nat'l Iranian Oil Co.*, No. 478 F. Supp. 724, 728 (S.D.N.Y. 1979).

case. It must be so held because the cartelization of oil is a central element of both the foreign and economic policies of the members of OPEC.

It is worth noting as well that antitrust suits are in general dubious under the theory lying behind the notion of sovereign immunity. Antitrust laws represent national ideological perspectives on the proper organization of an economy. Ideological conflict of this sort is typically a sensitive matter of policy. When a state itself is a defendant, it is to be expected that the policy considerations will be dominant.

These considerations must be read into the FSIA's definitions to restrict the area of "commercial activity" or the Act will not fulfill the function that sovereign immunity is called upon to perform in preventing unnecessary conflicts within the community of nations.