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LITIGATING AN INTERNATIONAL OIL DISPUTE

Jonathan Wallace*

The rise of the OPEC nations and the corresponding change in the international balance of economic power have led to an increase in litigation related to oil. Many of these cases have resulted from attempts by the oil-producing nations to gain greater control over their own resources, or to extract higher prices from purchasers. Libya alone has been responsible for a disproportionate

* J.D. 1980, Harvard University.
1. One commentator has stated that
The Programme of Action on the Establishment of a New International Economic Order . . . welcomed the increasingly effective mobilization by the whole group of oil-exporting countries of their natural resources for the benefit of their economic development.
Such a welcoming note may be viewed as an implicit tribute to the recent efforts of a small group of States, mainly the Arab oil exporters, to change the basic structure of the world economic order and the interests underlying its governing rules.

The nations supporting the NIEO, including the OPEC nations, assert

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amount of the recent litigation.\(^2\)

Oil litigation cases may be divided into three basic categories. In certain cases an oil company brings proceedings directly against the oil-producing state.\(^3\) In others, it sues an oil-producing or -trading entity of the state.\(^4\) In the third category, it does not proceed against the state or its entities at all, but against other oil companies, hoping to affect adversely the market for crude oil from the offending state.\(^5\)

The lawsuits in these categories have one thing in common:

full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals. . . . No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.


2. See generally Blair, The Control of Oil (1976) [hereinafter referred to as Blair]. Libya has asserted the Charter provision that

[i]n any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.

Charter, supra note 1, at Article 2(2)(c). Libyan refusal to recognize the competence of international arbitral panels was evidenced in the Libya-Oil Companies Arbitration of 1977. See Award on the Merits in the Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic, reprinted in 17 Int'l Legal Mat'ls 1, 27 (quoting the Memorandum of the Libyan Government dated July 26, 1974) [hereinafter referred to as Libya-Oil Companies Arbitration].

3. See notes 11-46 infra and accompanying text.

4. See notes 47-90 infra and accompanying text.

5. See notes 91-115 infra and accompanying text.
they have virtually never succeeded. Doctrines such as sovereign immunity\(^6\) and act of state\(^7\) have barred plaintiffs from success.

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6. The doctrine that a sovereign cannot be sued without its consent has been engraved deeply in our law and was well recognized by the 18th and 19th century international authorities. . . . The general rule was promulgated by Chief Justice Marshall in *The Schooner Exchange v. McFadden* [11 U.S. (7 Cranch) 116 (1812)], and was accepted without much question for over a century.


United States v. Diekelman, 92 U.S. 520 (1875), presents a most sweeping reading of the doctrine: "A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereign." *Id.* at 524.

A restrictive view of the applicability of the doctrine has developed in the post World War II period: this theory states that immunity should not be granted in cases arising out of commercial transactions (jure gestiones) but should be retained in cases involving governmental interests (jure imperii). This view has found expression in the *Tate Letter,* [1952] 26 Dep't State Bull. 984, and in the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330(d), 1441(d), 1602-11 (1976). It is submitted, however, that even under this restrictive view, plaintiffs will experience great difficulty enforcing judgments against OPEC sovereigns in the majority of cases.

7. The act of state doctrine is a creation of American courts, which arises out of the basic relationship between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. . . .

*[T]he Judicial Branch will not examine the validity of taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.*
On other occasions, plaintiffs have discovered that the defendant and the transaction did not have sufficient contacts to the forum to justify jurisdiction. A state trading entity may escape liability by pleading an act of state as force majeure. Finally, plaintiffs who clear all of these hurdles may discover that no assets of the foreign state are available on which they will be permitted to execute judgment.

This article will examine some of the noteworthy recent cases, most of which arose from the re-shuffling of economic power that occurred in the Gulf region in the early 1970’s.

Suit Against the State

Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic, an arbitration, may be the last great victory won by a plaintiff suing an OPEC nation.

After his accession to power in Libya via a military coup in 1969, Colonel Khadafy moved to increase control over oil production and to increase prices. By decrees of September 1, 1973, and February 11, 1974, his Revolutionary Council nationalized all right, title and property which had been granted to the above two companies in fourteen deeds of concession. The deeds pro-

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8. See notes 63-66 infra and accompanying text.

9. See note 84 infra for an example of a typical force majeure provision.

10. See notes 33-40 infra and accompanying text.


12. See Blair, supra note 2, at 211-34 for a useful summary of the events in Libya.

13. Libya-Oil Companies Arbitration, supra note 2, at 1, 4-5. Law No. 66 of 1973 (the Decree of Nationalization of 1 September 1973) provided for nationalization of 51% of the property, rights and assets arising under the Deeds of Concession. Law No. 11 of 1974 (the Decree of Nationalization of 11 February 1974) provided for the complete nationalization of all property, assets, rights and interests held by the companies under the Deeds.

The first decree was directed against seven other companies, as well as California Asiatic Oil Company and Texaco Overseas Petroleum Company, but not against all foreign companies holding concessions in Libya. The second decree was specifically directed against the plaintiff companies. While nation-
vided for arbitration of all disputes by means of three arbitrators, one to be appointed by each of the parties and the third to be appointed by the first two. When Texaco and Calasiatic demanded arbitration, Libya refused to participate. The plaintiffs then resorted to a provision of the arbitration clause which provided that in the event of a party's refusal to arbitrate, the other party could petition the International Court of Justice to appoint a sole arbitrator. When the plaintiffs petitioned the ICJ Libya responded by filing a memorandum with the Court contending that nationalization was a sovereign act not subject to arbitration. Libya filed no further pleadings and made no appearance in the case.

On December 18, 1974, the President of the ICJ appointed as sole arbitrator Rene-Jean Dupuy, the Secretary-General of the Hague Academy of International Law, and Professor of Law at the University of Nice. On January 19, 1977, Professor Dupuy issued an award entirely favorable to the plaintiffs.
Professor Dupuy began by noting that the deeds of concession and Article 20(1) of the Libyan Petroleum Law of 1955 made international law applicable.\(^\text{20}\)

On the substantive issues, he noted that "the right of a state to nationalize is unquestionable today . . . the exercise of the national sovereignty to nationalize is regarded as the expression of the State's territorial sovereignty."\(^\text{21}\) However, he concluded that the right to nationalize did not outweigh a state's obligation to honor its commitments.\(^\text{22}\) He looked, among other sources, to Libyan Civil Code Article 147(1), which states "The Contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by the law."\(^\text{23}\) He stated:

The result is that a state cannot invoke its sovereignty to disregard commitments freely under-

\(^{20}\) Id. at 7-9. The arbitrator relied on the reasoning for applying international law which was developed in the arbitration between the Government of Saudi Arabia and the Arabian American Oil Company (ARAMCO), 27 Int'l L.R. 117, 154-56 (1963) [hereinafter referred to as ARAMCO Arbitration]. In that arbitration it was concluded that while application of a municipal law not that of the sovereign party might offend the essential dignity of sovereign power, application of international law did not. \(^{24}\) Id.

The use of international law was contemplated by the parties in Clause 28 of the Deeds of Concession:

This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.

Libya-Oil Companies Arbitration, supra note 2, at 11.

\(^{21}\) Libya-Oil Companies Arbitration, supra note 2, at 21.

\(^{22}\) Id. at 22. Professor Dupuy stated:

Even though, for a State, the decision of nationalizing is an expression of its sovereignty, . . . does not the exercise of the right to nationalize know some limits? . . .

[T]he decision of a State to take nationalizing measures constitutes the exercise of an internal legal jurisdiction but carries international consequences when such measures affect international relationships in which the nationalizing State is involved.

\(^{23}\) Id. at 23.
taken through the exercise of this same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract.24

Regarding the remedy, Professor Dupuy held that monetary damages would not be sufficient, and ordered *restitutio in integrum*,25 a remedy even more unusual in international forums than it is in domestic ones. As arbitrator, Professor Dupuy had no power to enforce his award. He did, however, retain jurisdiction of the case, and gave Libya five months to formulate a method for putting plaintiffs back in possession.26

In reliance on the award, plaintiffs brought, or threatened to bring, actions against Libya or against third parties in a variety of jurisdictions.27 The New York Times reported some eight months later, on September 26, 1977, that Libya had agreed to provide the plaintiffs with $152 million in crude oil in exchange for termination of the arbitral proceedings.28

In the *Texaco* case, the arbitration award served as a sword which the plaintiffs could brandish, forcing the defendant into a settlement. As the case demonstrates, there are many advantages to including an arbitration clause in this type of contract. By agreeing to arbitration, a foreign state waives its sovereign immunity from jurisdiction.29 Arbitrators deciding under a law other than that of the United States do not have to wrestle with the act of state doctrine, which is unknown abroad.30 Even if United States law were applicable, the act of state doctrine bars the courts of the *United States* from sitting in judgment on the acts of another

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24. *Id.* at 24.
25. *Id.* at 36.
26. *Id.* at 37.
27. *See* e.g., Blair, *supra* note 2, at 232-33. When New England Petroleum purchased oil from Libya that had been lifted from Texaco-Calasiatic fields, the companies pursued New England in a “hot oil” suit in Sardania. *See* notes 47-68 infra and accompanying text.
state, an international arbitration tribunal is not a United States court and therefore should not feel bound by this doctrine.

In the last analysis, it is far easier for a plaintiff to get a favorable arbitration award against a foreign state than it is for him to obtain execution of that award. It is unlikely that the Texaco plaintiffs would have succeeded in executing their award against Libyan assets in the United States had they attempted to do so after passage of the Foreign Sovereign Immunities Act of 1976.

While the Act adopts the theory that sovereign immunity should be restricted to acts which are governmental in nature, the legislative history explicitly states that the Act was not intended to alter the extent to which the act of state doctrine "may be applicable." In addition, to obtain jurisdiction or attachment in aid of execution of a judgment, the property nationalized in violation of international law must be in the United States "in connection with a commercial activity" conducted by the sovereign state.

The Act's requirement of a connection between the asset to be executed upon and the original dispute would have ruled

31. See, e.g., Sabbatino, supra note 7.
32. An arbitrator deciding under international law is an autonomous entity, not part of any legal system, nor subject to any state; thus there is no state which sits in judgment on the acts of another. And where the state has agreed to arbitration of all disputes, there would seem to be no reason why an arbitrator should not rule on an act of sovereignty. The reasoning of the ARAMCO Arbitration seems applicable. See note 20 supra. Arbitration does not offend the essential dignity of a sovereign as suit in courts of another sovereign might.
33. The Arbitrator in the Libya-Oil Companies Arbitration explicitly noted that matters of enforcement were "not within the jurisdiction of the Arbitrator." Libya-Oil Companies Arbitration, supra note 2, at 8.
35. The Act provides, in pertinent part: "Under international law, states are not immune from jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602 (1976).
36. See H.R. Rep. No. 1487, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 6604. The plaintiff, then, may be able to assert sufficient jurisdictional facts only to find that the court will use the act of state rationale as a means of abstaining from rendering a decision on the merits.
38. See 28 U.S.C. § 1605(a)(3) (1976) for the limited circumstances in which the courts are granted jurisdiction over governmental acts of expropriation or nationalization.
out every available Libyan asset except one: oil being brought into the United States from the plaintiff's former oilfield. But these assets would not have been available for execution either, for one crucial reason: Libyan oil, by the time it enters the United States, is no longer in Libyan hands; it is in the hands of the oil companies, who have paid for it, who are innocent of any wrongdoing against the plaintiff, and who could reasonably argue that they were bona fide purchasers of the oil. Moreover, under the modern theory of nationalization, as expressed by Professor Dupuy in Texaco, Libya's wrongful act was not in transferring title to the oil from plaintiffs to itself or a third party; its wrongful act was its failure to pay. For this reason, plaintiffs would probably not have succeeded in executing their award upon any Libyan asset in the United States. Nevertheless, the tactic of attaching oil shipments in the hands of third parties was frequently tried, by the Texaco plaintiffs as well as by others, and is discussed below in the context of suits against third parties.

While an argument could be made that the arbitration agreement was a waiver by Libya of immunity from the jurisdiction of the courts of the United States, and that subsequent refusal to participate in the arbitration could not operate as a withdrawal of waiver, the arbitration agreement would not establish a basis for attachment of assets. Although arbitration agreements have been recognized as waiver from jurisdiction, they would not be deemed waiver from execution upon state assets. Further, even an explicit waiver will apply only to assets used in commercial activities.

39. An example of a case where a plaintiff might successfully execute a judgment under the Act might be the sale by an American company to a foreign state of an airplane to be used for ferrying goods purchased by the foreign state, which was not paid for, and which the foreign state was subsequently foolish enough to bring into the United States.
40. See note 21 supra and accompanying text.
Libya had agreed to all of its arbitration clauses in the 1950's when the balance of power was far different. It is less likely that any OPEC nation would agree to an arbitration clause today. Thus, plaintiffs are likely to be exposed to the broader range of problems that may arise from an attempt to sue a foreign state in a United States court.

Suit Against a State Trading Entity

Carey v. National Oil Corporation was one of the first cases decided under the Foreign Sovereign Immunities Act of 1976. It arose from the Texaco/Calasiatic nationalizations discussed above.

In 1968, Grand Bahama Petroleum Co. (hereinafter Petco) sought to secure a supply of low sulfur fuel for its parent company, New England Petroleum Co. (hereinafter Nepco). It did this through a complicated series of transactions whereby oil pumped from the Calasia/Texaco subsidiary concession was first sold to Calasia's affiliate Chevron Oil Trading Co. (hereinafter COT). It was then sold to Petco and finally to Nepco. COT, invoking *force majeure*, cut off shipments to Petco, after Libya nationalized fifty-one percent of Texaco and Calasiatic's holdings in September 1973. Libya then transferred the nationalized Calasia concession to the National Oil Corporation (hereinafter NOC), a corporation wholly owned by the Libyan government.

47. 453 F. Supp. 1097 (1978) [hereinafter referred to as Carey].
48. See notes 11-17 supra and accompanying text.
49. See Carey, supra note 47, at 1099. New England Petroleum Corporation is a New York corporation which, at all relevant times, was engaged in marketing petroleum products to utilities on the East Coast. The two subsidiaries involved, Petco and Antco Shipping Co., were both Bahamian corporations.
50. Id.
51. See note 84 infra for a definition of *force majeure*. See also text accompanying notes 78-90 infra for an analysis of an attempt to invoke *force majeure* when a government action precluded a contract from being fully executed.
52. See Carey, supra note 47, at 1099. Libya nationalized 51% of a number of other foreign-owned oil concessions as well.
53. Id. The NOC was empowered to engage in all facets of the petroleum business, including primarily the production and sale of crude oil. The NOC owned concessions in given regions from which it was permitted to extract oil.
On September 10 and 12, 1973, Petco, badly in need of oil, signed contracts with NOC under which Petco paid, respectively, $4.90 and $5.20 a barrel. After the Yom Kippur war, Libya, threatening a cut-off of supply, forced renegotiation of the price. A new contract for $16 a barrel was signed in late January of 1974. NOC made deliveries of oil through December 1975, when Petco, in the process of becoming insolvent, failed for the first time to pay for a shipment of oil. On May 24, 1977, NOC, as Petco's creditor, filed an involuntary bankruptcy petition against Petco in the Bahamas.

Carey, President of New England Petroleum, filed suit in New York against Libya and NOC, alleging that the January 1974 contract agreeing to higher prices had been made contingent on NOC's continued performance under the September contracts.

54. Id. Petco needed to replace its abrogated arrangements with COT in order for Nepco, the parent company, to fulfill the crude oil needs of the United States East Coast.

55. Id. These prices were higher than those under the COT contract.

56. Id. The court found that "[i]n response to this altered situation, NOC invited all its potential customers in Tripoli to submit bids for new contracts to supersede any then in effect." Id. at 1099.

57. Id. at 1099-1100. The Court found that:

Petco proposed to NOC a significant increase in its purchases, at a price of $14.14 per barrel. (The bid indicated that Petco would "meet the 'going price'.") Negotiations continued until January 29, 1974, when a contract was executed calling for a price of $16.00 per barrel for the first quarter of 1974, to be adjusted subsequently.

Id. at 1100.

58. Id. at 1100. In fact, oil was delivered to Petco throughout 1974 and 1975 under the 1974 contract for refining in Italy (during the embargo) and the Bahamas. However,

[i]n December of 1975, Petco failed for the first time to pay on time for a previously delivered cargo of oil. Despite attempts to reach an accommodation concerning both past-due payments and future deliveries, Petco was unable to satisfy NOC. On May 24, 1977, NOC sought be petition in the Bahamas to have Petco's affairs wound up.

Id.

59. Id.

60. Id.
This performance had not been forthcoming. Second, Carey alleged that Libya had intentionally frustrated Petco's contract with COT by nationalizing the Texaco/Calasiatic concession.\(^{61}\)

The court held:

Neither Libya nor NOC is amenable to suit in a United States court on any claim concerning the contracts between Petco and COT or Petco and NOC. There is room for substantial doubt whether, in fact, Libya itself was at all involved in either the abrogation of the old contracts, or their replacement—allegedly under duress—by the new ones. However, even assuming for the purposes of this motion that Libya's actions and motives were as asserted by plaintiffs, Libya and NOC are not in this case stripped of the sovereign immunity that generally attaches to them.\(^{62}\)

The Foreign Sovereign Immunities Act establishes a series

\(^{61}\) Id. Carey and Nepco brought a total of eight claims against Libya and NOC. They were as follows:

Claims 1 and 2 are addressed by Carey (as assignee of Petco) to the alleged breach by Libya and NOC of the agreements of September 10 and 12, 1973, respectively. Claim 3 is Carey's attempt to recover from Libya and NOC excessive amounts allegedly obtained by duress under the contract of January 29, 1974. Claim 4 is brought by Nepco against Libya and NOC, charging intentional frustration of the 1973 agreements of which Nepco was a known beneficiary.

Claim 5 is Carey's claim (as Antco's assignee) against Libya and NOC for excessive payments allegedly obtained by duress under the charter contracts. NOC is joined because it is claimed to have extorted these payments as the price of its own performance. Claims 6 and 7 are pressed by Carey (as Petco's assignee) and Nepco, respectively, solely against Libya, charging deliberate inducement of NOC's breach of the 1973 agreements. Finally, claim 8 accuses both Libya and NOC of having deliberately caused the circumstances in which the original supply contracts with COT could not be fulfilled.

\(^{62}\) Id. This holding was with regard to claims 1-4.
of exceptions to sovereign immunity, and a plaintiff must show that his case falls within one of these to establish subject matter jurisdiction. The only possible exception upon which plaintiff could rely was that embodied in Section 1605(a)(2), which states that jurisdiction exists where there has been an act outside of the United States in connection with a commercial activity of the foreign state, and that act has had a direct effect within the United States.63

If anything is apparent about the nature of the contacts between Libya and the United States in 1973-1974, it is that Libya consciously sought to reduce those contacts to nothing, if at all possible . . . it is evident that nothing Libya or NOC did concerning the 1968, 1973 or 1974 contracts could possibly have had a direct effect of a kind that would satisfy International Shoe . . . There has been absolutely no attempt by Libya or NOC to avail itself of any of the protections of privileges afforded by the United States . . . 64

The case both illustrates the difficulties faced by a plaintiff who must proceed in court rather than in arbitration and raises

63. 28 U.S.C. § 1605(a)(2) (1976) provides jurisdiction over actions 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.

64. Carey, supra note 47, at 1101. Probably the majority of cases decided so far under the Foreign Sovereign Immunities Act have dealt with the problem of sufficient contacts and have failed to find them. See, e.g., Verlinden v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980). In that case a Dutch corporation commenced an action for anticipatory breach of an irrevocable documentary letter of credit established in its favor by the defendant, the Central Bank of Nigeria. The court found that the bank was an "agency or instrumentality of a foreign state" within the meaning of the Act. It then held that there was no substantial contact with the United States within the meaning of the Act. Id. at 1296.
(but does not resolve) some special problems involved in proceeding against a state trading entity. Note, for example, in the first quote given above, that the court states two propositions which may be mutually exclusive: (1) Libya was not involved in the abrogation of the old contracts; this was done by NOC; (2) NOC, as well as Libya, is entitled to sovereign immunity. If the second proposition is true, NOC is entitled to sovereign immunity only because it is an agency of the Libyan state. But in that case, should not Libya be held responsible for NOC's acts, making the first proposition false?

The relationship between a state trading entity and the state may be crucial to a plaintiff's case in several respects. Ironically, showing that the entity is identified with a foreign state will not aid the plaintiff if the entity, itself, does not have minimum contacts as required by International Shoe. Also, an entity may seek to show that it is one with the state in order to claim the state's sovereign immunity. Or, by showing that it is separate from the state, an entity may entitle itself to rely on an act of the state as force majeure, releasing it from its contracts.

In Wetco Ltd. v. Libyan Arab Republic and Libyan National Oil Company, an unreported Swiss case, Wetco, a British company, contracted to purchase oil from NOC. The contract provided for a three-judge arbitration in Switzerland in the event of a breach. Alleging a repudiation of the contract by NOC, Wetco carried out a series of attachments at Geneva to gain jurisdiction over NOC. Then, NOC having declined to participate, Wetco petitioned the court to appoint an arbitrator to represent Libya and NOC.

65. See text accompanying note 62 supra.
66. See, e.g., Edlow v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827 (D.D.C. 1977). The defendant, a Yugoslavian entity, did not have contracts with the Northern District sufficient to justify jurisdiction under the standards of International Shoe Co. v. Washington, 326 U.S. 310 (1945). Plaintiff hoped that by bringing the case under the Act he would evade this problem, but the court, holding that the entity was not an instrumentality of the state, put plaintiff outside the Act. Cases such as Carey, supra note 47, have shown that plaintiffs will not find a more sympathetic jurisdictional standard under the Act than they would otherwise; International Shoe reigns everywhere.
67. As NOC did, in effect, in its defense in Carey, supra note 47.
68. See notes 78-90 infra and accompanying text.
69. 1978 Holding of Cour de Justice of Geneva, a copy of which is in the author's possession.
70. Id. at 4.
The lower court appointed an arbitrator for NOC but declined to hold that the state was a party to the arbitration. On appeal, the Cour de Justice reversed, finding two facts particularly significant. First, the Libyan government had controlled NOC's litigation of the case at every step of the way. Second, Libya has sought to show NOC's status as a trading entity, in claiming that NOC was forbidden to arbitrate by a 1970 law directed at all state agencies and entities. Libya had demonstrated to the court's satisfaction that NOC was subordinate to the Ministry of Petroleum.

The court concluded that, in contracting with NOC, Wetco could reasonably have believed that it was also contracting with the Libyan state. Also, Libya's behavior since the beginning of the suit indicated that it regarded itself as a party to the litigation. The Cour de Justice held that the arbitrator appointed would represent both Libya and NOC.

Too much should not be made of this case. The outcome of the arbitration, if any was held, is not in the public record. Even (as is relatively likely) if Wetco received a favorable award, its difficulties in obtaining execution in Europe would be similar in certain respects to those the Texaco plaintiffs would have had in the United States. Although act of state is not known in civil law countries and it is not clear that Wetco would be limited to executing on assets which bore a relationship to the cause of the action, civil law courts have imposed other restrictive requirements. For example, there is some precedent in France for the proposition that a plaintiff

71. *Id.* at 5.

72. *Id.* at 7.

73. *Id.* at 13.

74. As against the state. Note that where the defendant is a state agency or instrumentality, such as NOC, the Foreign Sovereign Immunities Act permits execution upon any property "regardless of whether or not the property is or was used for the activity upon which the claim is based." 28 U.S.C. § 1610(b)(2) (1976).
may not attach assets of a foreign state unless he can show in advance that the assets are destined for commercial ends—a difficult thing to prove. Although a plaintiff who has received a judgment or has an arbitral award upon which exequatur has been granted, may proceed to attachment with the aid of a sheriff and without further intervention by the court, the attachment must still be confirmed in a referee proceeding. It is not inconceivable that a plaintiff wishing to attach assets of a foreign state might, because of political considerations, fail to find a sheriff willing to assist him.

A famous arbitration of the 1950's illustrates the situation in which a state entity seeks to rely on the state's act as force majeure. Jordan Investments Ltd. v. Souzinefteksport was tried in the Foreign Trade Arbitration Commission of the Chamber of Commerce of the U.S.S.R. The Cour de Cassation has pronounced two contradictory decisions which remain unreconciled since stare decisis does not exist in France. In Englander v. Banque D'Etat Tchecoslovaque, [1970] Rev. Crit. 101, the court held that foreign state assets could be executed upon unless the defendant could show that they were committed to sovereign, rather than commercial, purposes. In Dame Clerget v. Representation commerciale de la Republique democratique du Viet-nam et autres, [1972] Rev. Crit. 312, it reversed the presumption and held, without citing Englander, that assets could be executed upon only if plaintiff could show that the assets were committed to commercial purposes.

75. See Paulsson, Sovereign Immunity From Execution in France, 11 The Int'l Law. 673 (1977). The Cour de Cassation has pronounced two contradictory decisions which remain unreconciled since stare decisis does not exist in France. In Englander v. Banque D'Etat Tchecoslovaque, [1970] Rev. Crit. 101, the court held that foreign state assets could be executed upon unless the defendant could show that they were committed to sovereign, rather than commercial, purposes. In Dame Clerget v. Representation commerciale de la Republique democratique du Viet-nam et autres, [1972] Rev. Crit. 312, it reversed the presumption and held, without citing Englander, that assets could be executed upon only if plaintiff could show that the assets were committed to commercial purposes.

76. Section 557 of the French Code de Procedure Civile allows a plaintiff who has obtained a judgment to proceed to an attachment of defendant's assets that are in the hands of a third party (e.g., a bank) with the aid of an huissier (sheriff). According to section 1024 of the Code, an arbitral award upon which exequatur has been granted (section 1020 of the Code) is a judgment for purposes of section 557.

77. Id., section 557.

78. 24 Zeitschrift Fur Auslandischrat Und Internationales Privatrecht 449, 540 (1959); the arbitral award is reported in English in Domke, The Israeli-Soviet Oil Arbitration, 53 Am. J. Int'l L. 787 (1959) [hereinafter referred to as Domke].

In the period from 1954 to 1956, Souiznefteksport (hereinafter Nafta) provided, under contract to Jordan Investments and another company, about thirty percent of Israel's fuel and crude oil consumption.\(^8\) Then, on November 6, 1956, about a week after the joint British, French and Israeli attack on Suez,\(^1\) Nafta informed Jordan Investments that the Ministry of Foreign Trade had cancelled its outstanding export licenses for deliveries to Israel and would grant no more. Nafta was in fact attached to the Ministry of Foreign Trade.\(^2\)

On October 25, 1957, Jordan proceeded to arbitration in the Foreign Trade Arbitration Commission, claiming damages for breach of contract and calling for delivery of 650,000 tons of fuel oil.\(^3\) Nafta in its defense relied on the contract's *force majeure* clause.\(^4\)

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81. *Id.*
82. *See* Domke, *supra*, note 78, at 801:

On August 4, 1956, the Corporation applied to the U.S.S.R. Ministry of Foreign Trade, hereinafter referred to as the Ministry, for an export license.

On November 5, 1956, the Ministry by letter advised the Corporation that the licenses applied for in accordance with the above contract dated July 17, 1956, would not be granted and that performance of said contract was prohibited.

On November 6, 1956, the Corporation informed the Company that the Ministry had advised the Corporation to the effect that export licenses for shipment of fuel oil during the years 1957 and 1958 as per the terms of the contract dated July 17, 1956, would not be issued and that accordingly pursuant to the Force Majeure clause (Paragraph 7 of the Contract), said contract was thereby canceled.

*See also* Berman, *supra* note 79, at 1129.

84. The clause provided:

Neither of the parties shall be liable for any damages or noncompliance with the terms of this contract or any part of these terms, if this damage or noncompliance is due to one or more of the following events preventing one or the other party from performing his duties under this contract in whole or in part: disasters of nature, fire, flood, war-like sets [sic] of any kind, blockades, strikes on the vessel carrying goods under this contract, acts or demands of the Government or
Jordan argued that Nafta's position within the Ministry meant that the act of one was to be considered the act of the other. Since the Ministry had denied the export licenses, Nafta could not be permitted to plead *force majeure*.

Jordan did not dispute, however, that Nafta, which signed its own contracts, had independent legal personality—a fact that the Tribunal found significant in holding that the Ministry's act had freed Nafta from its obligations under the contract. Partial as this holding may have been, Western courts in more recent cases have come to the same conclusion.

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other authoritative agency of the country under whose flag the chartered tankers belong; ... due to any other cause of whatever nature beyond the control of the defaulting party.

Berman, supra note 79, at 1129 n. 2.

85. See Berman, supra note 79, at 1130. Jordan's argument on this point was as follows:

It was urged, finally, that since Nafta and the Ministry of Foreign Trade are organs of the same state, and since Nafta, despite its separate legal personality, is administratively subordinate to the Ministry, the act of one is the act of the other and there can be no such conflict of wills between the two as is necessary to call into play the concept of *force majeure*.

*Id.*

86. See Domke, supra note 78, at 804 for the finding of the Arbitration Commission on this point. It stated:

'[T]he Corporation is a self-accounting economic organization, an independent subject of the law, i.e. a legal person conducting transactions on its own behalf and consummating its own will in the form of legally binding relationships. The Corporation is not an organ of the State administration. Therefore, the Company's endeavor to identify the Corporation with the Ministry lacks any foundation.

*Id.*

87. *Id.* at 805.

88. See, e.g., C. Czarnikow, Ltd. v. Centralia Handlu Zagranicznego Rolimpex [1978] 2 All E.R. 1043; [1978] 3 W.L.R. 274; 122 Sol. Jo., 506, H.L.; 17 Int'l Leg. Mat. 1384 (1978) [hereinafter referred to as Rolimpex]. In this case the Polish State Enterprise, Rolimpex, failed to perform contracts for the delivery of sugar. It relied on a decree of the Polish Minister of Foreign Trade & Shipping which prohibited the export of sugar as *force majeure*. In upholding the validity of this defense, it was noted in the House of Lords
How one reacts to this holding depends on how the terms are defined. From one point of view, the Soviet state should not be permitted to get out of its contracts merely by having one of its entities, the Ministry, order another, Nafta, not to perform its obligations. From another, even a Socialist state is not a monolith; the personnel of a state trading entity may do everything they can to carry out their agreements, including lobbying against an impending action of the Ministry to which they are attached. According to this view, a state trading entity would be barred from pleading force majeure only if it procured the state’s intervention. Much will depend on how strictly the trading entity is bound to and controlled by the state.

Suits Against Third Parties

Attachment of a foreign state’s oil in the hands of a third party, a popular tactic in the early and mid-1970’s, was known colloquially as the “hot oil” suit. Such suits placed indirect pressure on the foreign state, drying up its markets by making other oil companies unwilling to deal with it. Plaintiffs undoubtedly thought that by bringing “hot oil” suits, rather than by suing the foreign state directly, they were avoiding issues of sovereign immunity and act of state.

Occidental of Umm al Qaywayn v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis disillusioned them on this score.

In November 1969, the Trucial Sheikdom of Umm, in the Persian Gulf, granted Occidental the exclusive right to extract oil in its coastal water for forty years. One month later, the neighboring Sheikdom of Shajah gave Buttes Oil Company the same rights.

that Rolimpex was an independent legal person under Polish Law; it was not responsible for the obligations of the State Treasury; the Treasury was not responsible for its obligations; it could not claim sovereign immunity; and it had substantial freedom in making business decisions and in conducting its day-to-day activities.

90. This view was expressed in the House of Lords in Rolimpex, supra note 88.
91. 577 F.2d 1196 (5th Cir. 1978).
92. Id. at 1199. The boundaries of these concessions conformed to
Controversy arose over a tiny island in the mouth of the Persian Gulf, called Abu Musa, which was claimed by both Sheikdoms. Occidental was already drilling near Abu Musa, when on March 25, 1970, Shayah claimed the island. On May 28, Iran also claimed Abu Musa, and the National Iranian Oil Company, a state entity, ordered Occidental to cease drilling.  

On November 26, 1971, Iran and Shajah worked out an arrangement dividing the island and ratifying the Buttes concession. On November 30, the British protectorate over the Trucial Sheikdoms lapsed, and, that same day, Iran landed troops on Abu Musa. Buttes began drilling immediately. In June 1973, Umm terminated Occidental's concession on the grounds of nonpayment of rent. In 1974, Occidental seized several shipments of oil from the concession area as they entered the United States.

The court never reached the question of Buttes' title to the oil. It stated that

a determination of sovereignty over Abu Musa is necessary to the ultimate resolution of the right to the oil in this case. This question, however, we hold to be a political question and therefore nonjusticiable. Note well that this question would also have to be resolved under the 'act of state' doctrine.

The court did not explain what distinction existed between the two doctrines. The policies behind the two are nearly identical; both require judicial abstention from decisionmaking in certain areas. The political question doctrine, which is founded in the

an agreement between Umm and Sharjah of 1964. Under this agreement the island of Abu Musa and a three-mile territorial water zone were recognized as Sharjah's. The continental shelf adjacent to the three-mile zone was recognized to be in the possession of Umm. Id.

In March of 1970 Sharjah issued a decree purporting to extend its territorial waters to twelve miles. It granted Buttes Oil and Gas Company permission to drill for oil approximately nine miles east of Abu Musa, an area to which Umm had granted a concession to Occidental. These actions by Sharjah "did substantial violence to the 1964 treaty." Id.

Id. at 1200. Iran also claimed twelve miles of territorial waters.

Id.

Id.

Id.

Id.

Id.

Id. at 1201.
constitutional separation of powers, requires the judiciary to abstain from decisionmaking in areas committed to the other branches of government.\textsuperscript{100} The act of state doctrine similarly requires judicial abstention for the reasons discussed previously.\textsuperscript{101}

The \textit{Colocotronis} court failed to explain why, having the act of state doctrine to rely upon as a basis for decision, it found it necessary to drag the political question doctrine into the international arena as well. The dicta of the court which addresses the act of state doctrine indicates a belief that act of state is a constitutionally mandated doctrine, despite an explicit statement to the contrary in \textit{Sabbatino}.\textsuperscript{102} This dicta which raises the act of state doctrine to the level of a constitutional mandate is unsound; it threatens to place an insurmountable barrier before the plaintiff who wishes to litigate in the United States.\textsuperscript{103}

The court noted that, as of the time of the appeal, Occidental had attached some 120 shipments of oil. It enjoined all pending and future litigation of this nature in federal or state court.

The \textit{Dauntless Colocotronis} court relied heavily on \textit{Hunt v. Mobil Oil},\textsuperscript{104} which had been decided the previous year. Hunt had shared a concession in Libya with British Petroleum (BP).\textsuperscript{105}

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\textsuperscript{101} See note 7 \textit{supra}.
\textsuperscript{102} Notwithstanding the statement in \textit{Sabbatino}, \textit{supra} note 7, that the act of state doctrine was not compelled by the constitution, the court stated that “the better view would be that the doctrine is constitutionally \textit{compelled} by the concept of separation of powers and placement of plenary powers in the executive.” 577 F.2d at 1200-01, n.4 [emphasis added].

This reading of act of state effectively places the doctrine within the parameters of political question. Sitting in judgment of an act of state, then, under this court’s reading, becomes an activity constitutionally committed to the executive branch. Such an interpretation would preclude the courts from ever resolving a controversy centering on the activities of a foreign sovereign.

The court realized that this interpretation of act of state would render ineffective the Congressional intent, manifested in the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) 2370 (1976 & Supp. III 1979), that the courts not invoke act of state to decline decisions on the merits in cases involving confiscations in violation of international law, absent a determination by the President that the application of the doctrine would be required in the particular case. 577 F.2d at 1201 n.4.
\textsuperscript{103} Id.
\textsuperscript{104} 550 F.2d 68 (2d Cir. 1977).
\textsuperscript{105} Id. at 71. The field reached a production level of 450,000 barrels of low-sulphur crude per day. \textit{Id.} at 70-71.
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After Khadafy had begun demanding production cuts and price increases, the seven "majors" met secretly in New York, in January 1971, to outline a joint response to Libyan demands. First they approached the Justice Department, which promised not to prosecute on antitrust grounds but insisted that the independent companies such as Hunt be included.

On January 15, the companies signed the "Libyan Producer's Agreement," which provided that if Libya cut back any company's production, the others would make up the deficit on a pro rata basis. If there was insufficient Libyan oil available to satisfy all contractual obligations to European and American purchasers, Persian Gulf suppliers would sell oil at cost to Libyan producers so that they could meet these obligations. Hunt was a party to this agreement.

On December 7, 1971, Libya nationalized BP's half of the joint concession and asked Hunt to market BP's former share for

106. *Id.* The *Hunt* court stated that this and other onerous agreements which "were forced upon all the oil producers in Libya," were occasioned by the "heightened militancy" of the Revolutionary Command Council (RCC), the ruling political party in Libya. The head of the RCC, and thus in effect the undisputed ruler of the nation, was and still is Colonel Khadafy. (The court refers to him as Mu'ammar al-Qadhafi.) *Id.*

107. *Id.* The seven major oil producers, all of whom were named as co-defendants in the *Hunt* case, are: Mobil Oil Corporation; Exxon Corporation; Shell Petroleum Corporation, Ltd.; Texaco, Incorporated; Standard Oil Company of California; the British Petroleum Company, Ltd.; and Gulf Oil Corporation. *Id.* at 70 n.1.

108. *Id.* at 71. It was only after the Department of Justice imposed this condition that Hunt, who was an independent producer, was invited to join the secret meeting which produced the agreement that formed the basis for Hunt's suit. *Id.*

109. *Id.* The court stated that the agreement provided generally that if any party's crude oil production in Libya was cut back as a result of government action, all other producers would share in the cutback on a proportionate basis. It further provided that if there was insufficient Libyan oil to meet contractual obligations to existing European or Western Hemisphere customers due to restriction or government shutdown, the Persian Gulf producers would supply the Libyan producers with Persian Gulf oil at cost, with an option to pay cash in lieu of oil at a nominal sum per barrel.

*Id.* See also *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10, 16 (S.D.N.Y. 1975).
Libya's account. Hunt refused, and in early 1972, Libya took punitive action, evicting personnel from the concession, and cutting Hunt's quota by fifty percent. Both Hunt and BP, pursuant to the Agreement, received crude from other companies. Then, in October 1972, Libya demanded an immediate fifty percent equity participation in Hunt's remaining interest. Hunt again refused. On June 11, 1973, Libya nationalized all of Hunt's assets without compensation.110

In its suit, Hunt did not name Libya either as a defendant or as a co-conspirator. Instead, it sued the majors, alleging that they had combined and conspired to preserve the competitive advantage of Persian Gulf crude over Libyan crude. By entering into the Producer's Agreement, they had precluded Hunt from reaching a settlement with Libya, as most of the majors themselves did after Hunt was sacrificed.111

The court found that the nationalization was a political reprisal against the United States. The court stated:

We conclude that the political act complained of here was clearly within the Act of State doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya, the claim is non-justiciable.112

Hunt had tried to avoid this conclusion by making no claim that Libya had committed an illegal act. It argued, instead, that the defendants had unlawfully induced Libya to commit a lawful act.

The court stated:

The excision of the government of Libya from the pleadings as a defendant or coconspirator does not eliminate its action as a necessary element in the cause pleaded in the third claim.113

110. 550 F.2d at 71-72.

111. Id. at 72. Hunt also alleged violations of the Wilson Tariff Act, which precludes conspiracies between importers of foreign goods into the United States that are "intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce. . . ." Act of Aug. 27, 1894, c. 349, 28 Stat. 509, current version at 15 U.S.C. § 8 (1976).

112. 550 F.2d at 73.

113. Id. at 76.
In other words, the nature of Libya’s act was vital to plaintiff’s case, and the court could not “logically separate Libya’s motivation from the validity of its seizure.”

The lesson of these cases is that a plaintiff cannot improve his chances by suing a third party instead of the foreign state. Although this may assure that he will not have to face sovereign immunity questions, he will still have to confront act of state and political question issues, at least where the cause of action arises from a nationalization.

Conclusions

In an old anecdote, a tourist inquires how to get from Manhattan to a certain point in Brooklyn, and is told, “You can’t get

114. *Id.* at 77. In answer to Hunt’s argument that since Libya was not a named defendant the act of state doctrine did not apply, the court stated:

It is true that traditional and textbook definitions of the act of state doctrine provide that courts in the United States are precluded from inquiring into the validity of the public acts of the foreign sovereign committed in its own territory. However, while the skilled pleader here has meticulously avoided the issue of validity, its claim is admittedly not viable unless the judicial branch examines the motivation of the Libyan action and that inevitably involves its validity. The American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern.

*Id.* (citations omitted).

115. Another case involving Libya, in which the plaintiff sued a third party instead of Libya, is more accurately characterized as a “banking” than as an “oil” case. In Bosco Middle East Oil Corp. v. Bank of America, 343 F. Supp. 1072 (S.D.N.Y. 1972) plaintiff, a Texas company, had arranged for a guarantee running from the defendant to Libya, which Libya could call at any time. In 1972 Libya called the guarantee and the plaintiff sued to enjoin defendant from paying. The court held: “Plaintiff furnished the guarantees knowing full well that payment could be demanded by the government simply stating that the plaintiff is not in compliance with the law. The truth or falsehood of the charge cannot be a question for the banks to determine at their peril. That was not their understanding.” *Id.* at 1074.
there from here." Similarly, an oil plaintiff may well discover that litigation is a futile exercise. No Western national has formulated a policy that oil nations and their entities should not be held liable on contracts. The trend in the United States and in many European countries has been toward greater accountability for foreign sovereigns in national courts. Nevertheless, disparate legal doctrines such as act of state, sovereign immunity, and the rule of International Shoe combine to make life very difficult for the plaintiff in an international oil dispute. Part of the problem is that oil has been so heavily politicized. In another field of commerce, a cut-off of supply, or a forced renegotiation, might be seen as a commercial tactic; but when oil is the commodity involved, courts are quick to recognize, as the Hunt court did, an act not of commerce but of politics. This opens the door for the act of state and sovereign immunity problems. A businessman contracting with an OPEC nation assumes a tremendous business risk; when the deal goes sour and the businessman finds himself a plaintiff in an oil litigation, he is likely to find that the courts will afford him little recourse.

116. See, e.g., Int'l Ass'n of Machinist & Aerospace Workers v. OPEC, 477 F.Supp. 553 (C.D. Cal. 1979). The court held that controlling production of oil was a purely governmental activity. Id. at 568-69.