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# Jurisdiction-Act of State Doctrine- Foreign Sovereign Immunities Act (IAM v. OPEC)

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when a foreign sovereign is a party. The court reasoned that in view of the potential sensitivity of actions against foreign states, trial by a court without a jury would tend to promote a uniformity in decision in actions where foreign governments are involved.

**JURISDICTION - ACT OF STATE DOCTRINE - FOREIGN SOVEREIGN IMMUNITIES ACT**—*International Association of Machinist and Aerospace Workers (IAM) v. Organization of the Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354 (9th Cir. 1981) (as amended Aug. 24, 1981).

Appellant, International Association of Machinist and Aerospace Workers (IAM), brought this action for declaratory and injunctive relief against the Organization of Petroleum Exporting Countries (OPEC) and its member nations alleging that appellees had engaged in price fixing in violation of United States antitrust laws.<sup>1</sup> They also requested treble damages for the alleged violations. Refusing to recognize the jurisdiction of the court, the appellees did not appear, but their cause was argued by various amici, along with court-appointed experts. The district court initially dismissed OPEC as an entity (or organization), since OPEC had not been served. In the suit against the thirteen OPEC nations individually, the court granted judgment in favor of appellees based on its finding that the commercial activity exception to the Foreign Sovereign Immunities Act of 1976<sup>2</sup> was inapplicable.

On appeal, appellant contended that the lower court erred in its application of the FSIA, that under the pertinent "nature of the act" test, OPEC's activities—making agreements to fix prices—had been for profit, thus rendering them commercial.

The Ninth Circuit affirmed the district court's judgment, but on different grounds. Initially, the court adopted the district court's finding that the development and control of the terms and conditions for the removal of a prime natural resource was, indeed, the act of a sovereign state. The court reasoned, however, that the concerns espoused by the litigants were more appropriately addressed by the act of state doctrine, which "declares that a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state."<sup>3</sup>

The court also refused to accept the appellant's contention that

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1. Clayton Act, ch. 323, §§ 4-5, 38 Stat. 731 (1914) (current version at 15 U.S.C. §§ 15-16 (1976)). Sherman Anti-Trust Act, ch. 647, § 1, 26 Stat. 209 (current version at 15 U.S.C. §§ 1-2 (1976)).

2. 28 U.S.C. §§ 1602-1611 (1976).

3. 649 F.2d at 1358.

the FSIA superseded the act of state doctrine:

While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. . . . When the state *qua state* acts in the public interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. . . . [T]he act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved.<sup>4</sup>

The court then applied a balancing test and concluded that issues concerning the availability of oil significantly affects international relations and to grant injunctive relief would cause insult to the OPEC states and interfere with the efforts of the political branches to seek favorable relief.

The court further noted the absence of an internationally accepted legal principle that would render OPEC's activity in restraint of trade, thus, judicial interference in the area would be inappropriate.

SHIPS — DUTY TO REPAIR — COMMERCIAL IMPRACTICABILITY — *Asphalt International, Inc. v. Enterprise Shipping Corp.*, 667 F.2d 261 (2d Cir. 1981).

Asphalt International, Inc. instituted this action against Enterprise Shipping Corporation, S.A. in the Southern District of New York alleging breach of contract for failure to repair a vessel chartered by Asphalt. Asphalt had entered into an agreement with Enterprise to charter the Oswego Tarmac. This agreement obligated Enterprise to repair and insure the vessel. It also relieved Enterprise of liability for losses resulting from collisions, unless otherwise provided for by agreement. While in Curaco, the vessel sustained extensive damage. Enterprise, believing the vessel was a total loss, sold it and collected the insurance proceeds. Thereupon, Asphalt instituted this action alleging that Enterprise had breached its duty of repair under the agreement and sought damages for lost business and expected profits. The district court dismissed Asphalt's cause of action on two grounds. The charter agreement provided for release of maintenance if the cost exceeded the pre-collision fair market value and the doctrine of commercial imprac-

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4. *Id.* at 1360.