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Sovereign Immunity - Oil Price Fixing by Member States of OPEC Is a Governmental Act, Not a Commercial Act, and Thus Is Exempt from Suit under the Foreign Sovereign Immunities Act - Foreign States and U.S. Antitrust Laws - Foreign States Can Sue, but Cannot Be Sued under American Antitrust Laws

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RECENT DEVELOPMENTS

SOVEREIGN IMMUNITY—OIL PRICE FIXING BY MEMBER STATES OF OPEC IS A GOVERNMENTAL ACT, NOT A COMMERCIAL ACT, AND THUS IS EXEMPT FROM SUIT UNDER THE FOREIGN SOVEREIGN IMMUNITITES ACT. **FOREIGN STATES AND U.S. ANTITRUST LAWS**—FOREIGN STATES CAN SUE, BUT CANNOT BE SUED UNDER AMERICAN ANTITRUST LAWS. *International Association of Machinists v. OPEC,* 477 F. Supp. 553 (C.D. Cal. 1979).

The International Association of Machinists and Aerospace Workers, a labor union, filed suit in the United States District Court for the District of California against the Organization of Petroleum Exporting Countries (OPEC) and its thirteen member nations. The plaintiff alleged that OPEC's price fixing of crude oil between 1973-74 and 1978-79 violated American antitrust laws[1] and that these illegal acts caused injury to the labor union through higher gasoline prices at the pump. The district court dismissed the suit for money damages and injunctive relief and held that: (1) the plaintiff was an indirect purchaser of the defendants' product and thus was precluded from receiving damages under the Clayton Act;[2] (2) the court had no subject matter jurisdiction in this action because a nation's efforts to control the allocation of its natural resources, whether alone or in concert with other nations, is a governmental act which merits immunity from suit under the Foreign Sovereign Immunities Act of 1976;[3] (3) foreign nations can sue, but cannot be sued under American antitrust laws; and (4) it was not shown either generally or specifically that a direct causal link exists between the recent increases in domestic gasoline prices and the increases in crude oil prices charged by OPEC nations.

The court in this action had several reasons, each sufficient in itself, for dismissing the complaint. Not only did the suit fail on jurisdictional and procedural grounds, but on the merits as well. The complaint against OPEC was dismissed early in the proceedings because OPEC could not legally be served under either the Foreign Sovereign Immunities Act (FSIA) or the International Organizations

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1. 15 U.S.C. §§ 1-7 (1976).
2. 15 U.S.C. §§ 12-29 (1976).
3. 28 U.S.C. §§ 1602-1611 (1976).

Immunities Act (IOIA).[4] As the court pointed out, the FSIA only applies to nation states, which OPEC is not, and the IOIA only applies to international organizations which include the United States as a member, which is not the case with OPEC. The dismissal of the suit against the individual member states of OPEC, however, merited most of the court's attention and was based on procedural as well as substantive grounds.

First, the court rejected the portion of the complaint that asked for damages, because the plaintiff did not show that it had purchased crude oil or gasoline directly from the defendants. Thus, the plaintiff was considered to be as indirect purchaser. The court cited the United States Supreme Court's holding in *Illinois Brick Co. v. Illinois*[5] and ruled that a plaintiff in a price-fixing case is only able to recover damages if it has purchased directly from the price fixer. Accordingly, the labor union's prayer for damages was dismissed. The fact that the plaintiff was an indirect purchaser did not, however, preclude its ability to obtain injunctive relief against the defendants. For this ruling, the court cited *Mid-West Paper Products Co. v. Continental Group, Inc.*,[6] but admitted that whether an indirect purchaser can obtain an injunction for an antitrust violation remains an open question. What did preclude the requested injunction, resulting in the dismissal of the remainder of the plaintiff's complaint, was the defendants' ability to invoke sovereign immunity under the FSIA, which deprived the court of subject matter jurisdiction under 28 U.S.C. § 1330(a).[7]

Under the restrictive theory of sovereign immunity as codified in the FSIA, a foreign country can claim immunity from suits filed against it in the United States if the act for which it is being sued was a sovereign or governmental act. It cannot claim immunity for acts based on "commercial activities."[8] Whether an act of a foreign state is a commercial activity is to be determined by making reference to the nature of the action, and not to its purpose.[9] In this case, the

4. 22 U.S.C. §§ 288a-288i (1976).
5. 431 U.S. 720 (1977).
6. 596 F.2d 573 (3d Cir. 1979).
7. 28 U.S.C. § 1330(a) (1976) reads:

> The district courts shall have original jurisdiction without regard to amount in controversy of any noninjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

8. 28 U.S.C. § 1605(a)(2) (1976).
9. 28 U.S.C. § 1603(d) (1976).

court considered the action in terms of the right of nations to control their natural resources in accordance with the interests of their national development and self-determination. Specifically, the court cited General Assembly Resolution 1803 which declares the right to permanent sovereignty over natural resources.[10] In view of the fact that the United States voted in favor of this resolution, and because article IV of the United States Constitution supports the theory of permanent sovereignty over natural resources,[11] the court concluded that "[t]he defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples."[12] Thus, because the defendants were able to invoke sovereign immunity under the FSIA, the court was deprived of subject matter jurisdiction.

The plaintiff's suit was dealt another blow when the court held that while foreign states can be plaintiffs in antitrust suits, they cannot be made defendants. The authority for the rule that foreign states can sue under the United States' antitrust laws came from a recent Supreme Court decision, *Pfizer, Inc. v. India*.[13] The court, however, refused to extend *Pfizer* to the question of whether nations can be made defendants. Instead, it followed a thin line of authority provided by *Hunt v. Mobile Oil Co.*,[14] decided by the second circuit in 1977, and *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*,[15] decided by the federal district court in Delaware in 1970. These cases reasoned that to allow foreign states to be sued under the antitrust laws would "require judicial interference in sensitive foreign policy matters."[16] Thus, the court drew a parallel with the

10. G.A. Res. 1803 (XVIII), U.N. Doc. A/5217 (1962). The rights of states to excercise full control over their resources in accordance with their national interests has been reflected in numerous United Nations General Assembly resolutions. *See, e.g.*, G.A. Res. 1515 (XV), U.N. Doc. A/4648 (1960); G.A. Res. 2158 (XXI), U.N. Doc. A/6316 (1966). *See generally*, North Sea Continental Shelf Cases, [1969] I.C.J. 39 (in which the International Court of Justice recognized the sovereign rights of nations to exploit their natural resources).

11. U.S. CONST. art. IV, § 3, cl. 2, reads:

> The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

12. 477 F. Supp. at 568.

13. 434 U.S. 308 (1978).

14. 550 F.2d 68 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977).

15. 307 F. Supp. 1291 (D. Del. 1970).

16. 477 F. Supp. at 572.

rule settled by the Supreme Court that domestic States may sue,[17] but may not be sued,[18] under the antitrust laws.

Finally, as the *coup de grace* to the plaintiff's suit, the court decided that the case also failed on its merits. In order for the plaintiff to have been able to obtain an injunction, it would have had to show that the increases in gasoline prices paid by its members in 1973-74 and 1978-79 were the proximate result of OPEC price hikes for crude oil during those years. The court ruled that because of the number of intervening factors, it was not shown, either generally or specifically, that the OPEC price hikes were the primary causes of the dramatic rise in gasoline prices. Noting that shortages in refinery capacity, an unexpected increase in gasoline consumption in 1978, and the reduction of Iranian oil supplies had their share in contributing to higher gasoline prices in the United States, the court placed most of the blame for the plaintiff's injury on the Department of Energy. Elaborating on the harm rendered to domestic gasoline supplies by government mismanagement, the court concluded that "as soon as a crisis developed, both the Federal Department of Energy and various State energy offices stepped in to turn a small shortage into a large and horrendous shortage."[19]

The court in this case helped to clarify the standing of foreign states vis-à-vis American antitrust laws. With the increasing prospect of economic coercion by such organizations as OPEC, *International Association of Machinists* strengthens the principle that foreign states cannot be held to the antitrust standards contained in the Sherman Act.

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17. Georgia v. Evans, 316 U.S. 159 (1942).
18. Parker v. Brown 317 U.S. 341 (1943).
19. 477 F. Supp. at 574.