

SUITS AGAINST INTERNATIONAL ORGANIZATIONS IN FEDERAL COURT: OPEC, A CASE STUDY

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Since the end of World War II there has been a proliferation of international organizations. In 1975, there were at least eighty-three international organizations operating throughout the world.¹ The rights, duties and place of these organizations in international and municipal law are uncertain. Prior to the appearance of international organizations, international law as well as the domestic law of most states, had not been forced to differentiate between the legal concepts of international personality and national sovereignty. Consequently, international usage has blended these two legal concepts without demarcation. A separation of the two concepts is now necessary, particularly with the advent of the economically motivated international organization,² as contrasted with the public welfare organization.³ Many of the economically motivated international organizations, such as the Organization of Petroleum Exporting Countries (OPEC), are capable of exerting, and do in fact exert, tremendous economic pressure on the international community, even to the point of threatening sovereignty.

In the absence of an effective international forum the only way to check the powers of these international organizations and adjudicate disputes is to resort to municipal courts and municipal law. But municipal law, like international law, is not prepared to deal with international organizations.⁴ International organizations are

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1. See D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* xi-xiv (1975) for a list of these international organizations.

2. For example, the European Economic Community, Organization for Economic Co-operation and Development, Andean Pact, and other free trade associations and common markets.

3. For example, the United Nations and its specialized agencies such as World Food Program (WFP), World Health Organization (WHO), United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Children's Fund (UNICEF), and United Nations Relief and Rehabilitation Agency (UNRRA).

4. For example, suit was dismissed against OPEC for lack of jurisdiction in *Int'l Ass'n of Machinists and Aerospace Workers v. OPEC*, 477 F. Supp. 553 (D.C. Cal. 1979)[hereinaf-

not sovereign states, corporations or persons. Whether an international organization is capable of litigating its disputes within a municipal forum depends on whether the laws of the applicable sovereign accord the international organization "legal capacity."

This Article explores the amenability of international organizations, particularly OPEC, to litigation in United States courts. This inquiry will be preceded by the formulation of a concise definition of international legal personality and its attributes. In particular, the privileges and immunities afforded international organizations by United States law will be delineated and examined. Once the international and domestic status of international organizations has been established, the legal as well as the practical difficulties encountered in acquiring jurisdiction will be explored.

I. INTERNATIONAL LEGAL PERSONALITY

Two distinct approaches have been used to determine whether an organization created by States has legal personality.⁵ These two approaches may be labeled the "inductive" approach and the "objective" approach. The inductive approach requires an inquiry into the intent of the forming States by examining the evidence surrounding the organization's formation. In practice, this approach primarily involves examining the governing documents of the organization.⁶ Under the inductive approach, a search of the organization's governing documents is made for the attributes of international legal personality, expressed or implied in those documents. From this it can be determined whether an international organization possess international legal personality. The objective approach does not inquire into the intent of the forming States as expressed in the governing documents. Rather, this approach requires an examination of the structure of the organization in the light of the principles of international law.⁷

The objective approach to international legal personality was

ter cited as Int'l Ass'n of Machinists]. Moreover, the court thought that it would be impossible to acquire jurisdiction over OPEC. *Id.* at 560.

5. See, e.g., D. BOWETT, *supra* note 1, at 299-304. See I. BROWNLE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 520 (1966), for a discussion of the inductive approach. See for example SEYERSTED, *OBJECTIVE INTERNATIONAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS* (1963), for a discussion of the objective approach.

6. Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 44 *BRIT. Y. B. INT'L L.* 111, 112 (1970) [hereinafter cited as Rama-Montaldo].

7. *Id.*

utilized by the International Court of Justice in its advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations*⁸ There the Court set out four necessary preconditions for the existence of international legal personality. First, the organization must be created as more than a mere center for the harmonization of States' actions in the attainment of common ends.⁹ This precondition distinguishes between organizations such as the United Nations and the British Commonwealth. Second, the organization must be equipped with an infrastructure of its own.¹⁰ A conference or congress of states would not satisfy this precondition. Third, special tasks must be assigned to the organization.¹¹ Fourth, the position of the organization *vis a vis* its members must be defined in such a way as to give the organization a life of its own, detached from that of its members.¹² In other words, the organization must be capable of expressing a will of its own, either by a power of decision binding on members by majority vote or by the competence of the organization to exercise certain independent functions. Once these four essential preconditions are met, international legal personality will be established. Certain consequences will then follow as a result of this determination.

The primary consequence of establishing that an organization possess international legal personality is that such an organization is deemed a subject of international law and capable of possessing international rights and duties.¹³ The attributes of international legal personality are generally conceded to be: (1) the power to make treaties; (2) the attribution of privileges and immunities; (3) the power to contract; and, (4) the power to undertake legal proceedings.¹⁴ Despite the significance of these attributes, possessing international legal personality does not place an international organization on the same legal plane as a sovereign.

1. *The Inductive Approach*. The application of the inductive approach to organizations of lesser magnitude than the United Nations provides little more than a determination of legal personality for municipal law purposes of the forming States. The existence of

8. 1949 I.C.J. 174.

9. *Id.* at 178.

10. *Id.*

11. *Id.*

12. *Id.* at 178-79.

13. *Id.* at 179.

14. D. BOWETT, *supra* note 1, at 302.

legal personality in international law under the inductive approach depends upon the acceptance of the legal personality of the organization by States not parties to the formation.¹⁵ The acceptance of legal personality in the municipal law of substantially all States would certainly prove legal personality on the international plane. At the same time, the absence of acceptance or the acceptance by just a few States outside of the forming group would cast serious doubt on the existence of international personality of an organization. However, when an organization has international legal personality under the objective approach, it is an international person and the recognition of that legal personality in the municipal law of each State is immaterial.¹⁶

In applying the inductive approach to determine whether OPEC has international legal personality the starting point is the Statute of the Organization of Petroleum Exporting Countries.¹⁷ Not surprisingly, the OPEC Statute does not refer to the Organization's international status, although it is clear that the members created an independent entity.¹⁸ With no express indication of international legal personality in the OPEC Statute, an examination must be undertaken to determine whether OPEC possesses the four attributes of international legal personality. The OPEC Statute is silent with respect to treaty making power, privileges and immunities, the power to contract, and the right to sue and be sued. However, under the doctrine of "implied powers" the organization possesses those powers and functions which, while not expressed, are conferred upon it by necessary implication as being essential to the performance of its duties.¹⁹

Nothing in the OPEC Statute requires that a treaty-making power be implied in order for OPEC to perform its functions and duties. Nevertheless, pursuant to Article 5 of its Charter, OPEC has entered into an agreement with Austria regarding OPEC's

15. *E.g.*, Agreement on Judicial Status, Mar. 10, 1955, Switzerland-World Meteorological Association (WMO), 211 U.N.T.S. 278.

16. The United Nations as an international person had the legal capacity to make an international claim for reparation for injuries even against a nonmember defendant State. 1949 I.C.J. 184-85.

17. Resolution VIII. 56 adopted at the Eighth Conference (Extraordinary) *reprinted in*, 4 I.L.M. 1175 (1965), held in Geneva Switzerland April 5-10, 1965.

18. Statute of the Organization of Petroleum Exporting Countries (OPEC), art. 27(A), *reprinted in*, 4 I.L.M. 1175, 1182 (1965), provides that the Secretary General shall be the legally authorized representative of the organization [hereinafter cited as OPEC STATUTE].

19. 1949 I.C.J. 182.

headquarters.²⁰ Such an agreement is in fact a treaty.²¹ Apparently, OPEC has read into Article 5 an implied treaty-making power. Within international legal analysis there is no better evidence of what the forming States intended than their subsequent actions through the organization.

Chapter III of the OPEC Statute provides for a Secretariat whose staff is to be exclusively of an international character.²² The staff is not to seek or accept instructions from any government or outside authority and is charged with the execution of its duties solely in the interest of the organization.²³ Implicit in the creation of a Secretariat with international employees is the privileges and immunities normally granted to such employees.²⁴

The power to contract is a necessary implied power of any organization which must establish a headquarters and create a secretariat and a bureaucracy. In addition, real estate must be acquired, supplies purchased, employees hired and services supplied if the organization is to function. A necessary corollary of the power to contract is the capacity to sue and be sued in order to enforce those contracts. Moreover, the Enforcement Department of OPEC is charged with the follow-up and implementation of resolutions and recommendations made by the Conference which requires action by the members and the Secretariat.²⁵ In order to enforce its resolutions and recommendations, OPEC must implicitly have the power to test the legality of its acts and their consequences; therefore, the capacity to sue and be sued is essential if OPEC is to fulfill its functions and duties.

Under the inductive approach, OPEC has international legal personality. There is no question that OPEC members accept the

20. Agreement Regarding the Headquarters of the Organization of the Petroleum Exporting Countries, *signed* June 24, 1965, Austria-OPEC, 589 U.N.T.S. 135 [hereinafter cited as Headquarters Agreement].

21. A treaty is an agreement in written form governed by international law and concluded between two or more States, or other subjects of international law possessed of treaty-making capacity. Art. 2, Report of the International Law Commission to the General Assembly, 14 U.N. GAOR Supp. (No. 9) at 9, U.N. Doc. A/4169 (1959), *reprinted in*, (1959) 2 Y.B. INT'L. L. COMM'N 87, 95, U.N. Doc. A/CN.4/Ser.4/Add.1.

22. OPEC STATUTE, *supra* note 18, art. 32.

23. *Id.*

24. Privileges and immunities normally accorded diplomatic and international employees include immunity from legal process unless waived, immunity from search of premises and archives, currency and fiscal privileges such as transfer of funds free of fiscal controls and regulations and exemption from direct taxation, and freedom of communication without censorship. D. BOWETT, *supra* note 1, at 308-14.

25. OPEC STATUTE, *supra* note 18, art. 36(1).

organization's international status. The primary concern is the acceptance of that status by nonmember states. Three nonmember states with varying views on this issue are Austria, Switzerland and the United States. Austria has expressly accepted OPEC's international legal personality.²⁶ Switzerland has tacitly accepted OPEC's international status by allowing OPEC to operate within Switzerland from 1960 to 1965. The United States has not officially recognized OPEC's international status. This uncertainty over OPEC's international legal personality can be resolved if OPEC has international legal personality under the objective approach.²⁷

2. *The Objective Approach.* In the *Reparation Case*²⁸ the I.C.J. enunciated four preconditions necessary to the existence of international legal personality under the objective approach. The I.C.J. held that an international organization is required to: (1) be more than a center which coordinates State conduct; (2) possess an infrastructure; (3) perform "special tasks;" and, (4) have a life of its own. An analysis of OPEC under the objective approach shows that these four criteria are satisfied, and that OPEC thus possess an international legal personality.

The first criterion, that an international organization be a center which coordinates State conduct, is easily satisfied. At its inception OPEC was intended to be more than a conference of oil ministers. OPEC's members not only set oil policies but they also implement those policies. OPEC policies are not merely determined at conference meetings and then left to the individual members to implement within their own territories.²⁹ OPEC has checked the power of the major oil companies and made the members truly sovereign over their natural resources.³⁰ The OPEC Special Fund was established to assist nonmember Third World States through the financing of balance of payment deficits, the financing of specific development programs or projects and the lending of money to international development agencies for the benefit of developing countries. Clearly, OPEC is more than a conference of oil ministers and at least a coordinator of State conduct.

26. See Headquarters Agreement, *supra* note 20.

27. See *supra* note 18 and accompanying text.

28. See *supra* note 8.

29. OPEC STATUTE, *supra* note 18, arts. 2, 15(1) & 36.

30. OPEC stabilized and then raised the "posted" or "tax-reference" oil prices which had been unilaterally set by the oil companies prior to 1970. See OPEC Res. XXI.120 (Dec. 1970) *reprinted in*, 10 I.L.M. 240 (1971) [hereinafter cited as OPEC Res.].

OPEC's infrastructure satisfies the second precondition under the objective approach. OPEC has three organs: The Conference, the Board of Governors, and the Secretariat.³¹

The third precondition to international legal personality under the objective approach is that special tasks must be assigned to the organization. Those special tasks are set out in Article 2 of the OPEC Statute. The primary task of OPEC is the coordination and unification of its members' petroleum policies. OPEC's secondary task is to find ways and means of insuring stabilization of prices in the international oil market. Incidentally, OPEC has been quite successful in accomplishing these tasks.³²

The fourth and final precondition to the possession of international legal personality focuses on OPEC's capacity for expressing a will of its own, independent from that of its member states.³³ The Secretariat staff is prohibited from seeking or accepting instructions from any government and required to perform solely in the interest of OPEC.³⁴ The Conference acts only by unanimous vote³⁵ which makes determination of an independent will more difficult. However, other evidence of an independent will can be found. For example, the Economics Department,³⁶ the Enforcement Department,³⁷ the Public Relations Department³⁸ and the Technical Department,³⁹ all perform organizational functions for the benefit of OPEC's members as a whole. As is sometimes the case, the conclusions and recommendations made by these departments are not in the best interest of a particular member. This willingness on the part of OPEC's operational departments to run contrary to the interests of individual members helps support the conclusion that OPEC has a will of its own.

In conclusion, OPEC meets the four preconditions for interna-

31. OPEC STATUTE, *supra* note 18, art. 9.

32. Stabilization was accomplished by means of OPEC Res. XXI.120 (Dec. 1970). See OPEC Res., *supra* note 30. Unification of prices has been accomplished by the establishment of a bench price for Saudi Arabian crude but variation in prices does occur as a result of spot markets and dissension in the ranks. OPEC has drafted and urged adoption of uniform petroleum laws. Declaratory Statement of Petroleum Policy in Member Countries, OPEC Res. XVI.90 (June 1968), *reprinted in* 7 I.L.M. 1183 (1968). See also OPEC Res. XXIV.135 (July 1971), *reprinted in* 10 I.L.M. 1082 (1971).

33. Rama-Montaldo, *supra* note 6, at 145-6.

34. OPEC STATUTE, *supra* note 18, art. 32.

35. *Id.* art. 11(c).

36. *Id.* art. 35.

37. *Id.* art. 36.

38. *Id.* art. 37.

39. *Id.* art. 38.

tional legal personality as enunciated in the *Reparation Case*. Therefore, OPEC possesses the attributes of an international person, regardless of its treatment in the municipal law of any nonmember.

II. IMMUNITY FROM SUIT

The existence of international legal personality, determined under the inductive approach, is dependent upon the good will and recognition of third-party States outside the forming members. If international legal personality is not recognized by a third-party State the organization has no rights or privileges within the municipal law of the third-party State since the organization is not recognized as a juridical person. Therefore, the organization cannot sue and be sued in the courts of the nonrecognizing third-party State. At present, the United States has not expressly recognized OPEC as an international person. Therefore under the inductive approach OPEC would not have access to United States federal courts.

On the other hand, if OPEC has international legal personality under the objective approach, express recognition of the organization as an international person is not necessary. Therefore, OPEC would be entitled to sue and be sued within the United States. It would also be entitled to all the privileges and immunities that are necessary for the independent exercise of OPEC's functions. At the same time, however, an international organization does not possess all of the privileges and immunities accorded sovereigns, but only those necessary to the performance of its functions. If a sovereign would not be immune from suit neither would an international organization performing the same function or activity.

A sovereign is immune from suit in the courts of the United States as far as any political (*jure imperii*) act is concerned.⁴⁰ However, if the activity is commercial in nature, the sovereign is not granted immunity.⁴¹ Whether a sovereign engaged in the extrac-

40. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), cert. den. 381 U.S. 934 (1965); Foreign Sovereign Immunities Act of 1976, § 4(a), 28 U.S.C. §§ 1602-1611 (1976).

41. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1976) [hereinafter cited as FSIA]. Passage of the FSIA represents an adoption by Congress of the restrictive theory of Sovereign immunity which was first stated as United States policy in the "Tate Letter," 26 DEP'T STATE BULL. 984 (1952). Under the restrictive theory, sovereign immunity is recognized only with respect to sovereign or public (political) acts but not with respect to private (commercial) acts. *Id.* For a good commentary on the FSIA, see Brower, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L. L. 200 (1979).

tion, refining, or marketing of oil is engaged in a political or commercial activity is a purely subjective determination.⁴² From the point of view of the sovereign, whose entire economy virtually depends on its oil reserves, any part of that industry would be considered political activity.

In *International Ass'n of Machinists and Aerospace Workers v. OPEC*,⁴³ based in part on United Nations resolutions⁴⁴ and the nature of sovereignty, Judge Hank found that “[c]ontrol 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.”⁴⁵ Judge Hank’s conclusion was preordained by the characterization he gave to the activity involved. A House Judiciary Committee Report of 1976 defined “commercial activity” as any activity which is normally engaged in by a private party, while an activity in which only a sovereign may engage in is a political activity.⁴⁶ By characterizing the activity as “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,”⁴⁷ Judge Hank forced the conclusion that it was a political activity. It is indeed true, as stated by Judge Hank, that control over natural resources arises out of sovereignty over territory,⁴⁸ and that the extraction of those natural resources may be crucial to the welfare of the people of the State.⁴⁹ However, the “sovereign” nature that Judge Hank seeks to attribute to the extraction of natural resources diminishes when one considers the fact that the freedom of a sovereign to dispose of its natural resources is

42. For a discussion of this issue see Lashbrooke, *Vertical Integration and Restraints by the Oil-Producing Sovereigns: Antitrust Implications and Supply Considerations*, 13 N.Y.U.J. INT’L L. & POL. 193, 205-09 (1980).

43. Int’l Ass’n of Machinists, *supra* note 4.

44. Declaration of Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR SUPP. (No. 17) 15, U.N. Doc. A/5217 (1962) [hereinafter cited as Natural Resources]. This resolution recognizes “the inalienable right of all States freely to dispose of their national wealth and resources in accordance with their national interests, and ... respect for the economic independence of States ...” See also G.A. Res. 1515, 15 U.N. GAOR, Supp. (No. 16) at 9, U.N. Doc. A/4648 (1960); G.A. Res. 1314, 13 U.N. GAOR Supp. (No. 18) at 27, U.N. Doc. A/4090 (1958).

45. Int’l Ass’n of Machinists, *supra* note 4, at 568.

46. H. R. Rep. No. 94-1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6615.

47. Int’l Ass’n of Machinists, *supra* note 4, at 567.

48. *Id.* at 568.

49. *Id.*

not unfettered. There are some rather severe limitations on this power.

First, the terms and conditions for the disposal of natural resources are limited to the territory of the sovereign. The universally accepted territorial principle permits a state to exercise its legislative power only over its own territory.⁵⁰ The prescribed activity is legal within the territory of the legislating sovereign but carries no extraterritorial validity. Moreover, what is legal in one jurisdiction may well be illegal in another and may be actionable under the extended territorial principle known as the "effects doctrine"⁵¹ which is generally applied to cases involving economic interests. The criteria for the extraterritorial application *vel non* of the United States antitrust laws under the effects doctrine are set out in *United States v. Aluminum Co. of America*.⁵² The defendant must: (1) *intend* the act to have an effect within the United States; and, (2) such an effect must actually occur within the United States.⁵³ Applying these two criteria to the OPEC case, it is clear that the OPEC sovereigns intended that their price setting acts have an extraterritorial effect. It is equally clear that the acts did have extraterritorial effects although Judge Hank found that the plaintiff failed to prove proximate cause by not being able to demonstrate that the price increases were a substantial factor in the increased prices of domestic gasoline.⁵⁴ A final restriction is contained in the very United Nation's resolution cited by Judge Hank in support of his conclusion. The freedom to dispose of natural resources is limited by the sovereign's own national interests and respect for the economic independence of other States.⁵⁵ While extracting the highest possible price for exhausting natural resources may be in the national interest of the OPEC sovereigns, the increased petroleum prices brought industrialized society to the brink of economic disaster. The very existence of the vast amount of petrodollars has virtually destroyed the international monetary system and made

50. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18, comment d, 20 (1965) [hereinafter cited as Restatement].

51. *Id.* Section 18 states in relevant part:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and *causes an effect* within its territory, if ...

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems...(emphasis added).

52. *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-45 (2d Cir. 1945).

53. *Id.* at 444-45.

54. See Int'l Ass'n of Machinists *supra* note 4, at 574.

55. See Natural Resources, *supra* note 44, and accompanying text.

world economic planning a guessing game. The existence of as much as one trillion dollars in Eurocurrency has inundated the Bretton Woods Agreements.⁵⁶ This currency is stateless and beyond the control of any country to regulate. It contributes to inflation, to shifts in balance of payments, and to the undermining of national currencies. Certainly, the pricing practices of OPEC's members interfered with the economic independence of other States.

These limitations aside, the court's conclusion is further undermined by the fact that it discounted the legislative history of the Foreign Sovereign Immunities Act of 1976 which clearly states that mineral extraction is a commercial activity.⁵⁷ While both the extraction and disposition of crude oil may be considered political activities by a sovereign, the sale of a service or product is a commercial activity carried on for profit within the meaning of the Foreign Sovereign Immunities Act.⁵⁸ Marketing activities such as setting the price of oil, public relations campaigns, and negotiating other agreements with the major oil companies are without a doubt commercial activities. OPEC does not extract or dispose of crude oil since it does not own any oil. The individual sovereigns own the oil. OPEC is a marketing and public relations operation. Since a sovereign engaging in these activities would be engaged in commercial activities and not be immune from suit, neither will an international organization engaging in those activities be immune from suit. As an international person, OPEC would not be immune from suit as a matter of international law since such immunity is not necessary to carry out its function. Neither would OPEC's constituent member sovereigns be immune from suit for engaging in the same activities.

An international organization may, however, be immune from suit if so provided by municipal ordinance. Section 2 of the International Organization Immunities Act⁵⁹ provides immunities and privileges for certain international organizations.⁶⁰ But, the immu-

56. The Bretton Woods Conference held in 1944 developed the financial institutions and agreements for economic recovery and development including the International Monetary Fund, International Bank for Reconstruction and Development, and the General Agreement on Tariffs and Trade.

57. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6614-15.

58. *Id.*

59. 22 U.S.C. § 288a (1976).

60. *Id.* See also 22 U.S.C. § 288 (1976), which defines "international organization" to be

nity from suit provided by this law is limited to that which would be enjoyed by foreign governments.⁶¹ Applying this language to OPEC, even if the United States were to recognize OPEC as an international organization for purposes of section 2, OPEC would not be immune from suit because a foreign government engaged in those same commercial activities would not be immune from suit.

In conclusion, under the objective approach, OPEC is an international person entitled to certain privileges and immunities. Immunity from suit in federal court cannot, however, be deemed necessary to the performance of OPEC's functions, nor is such immunity provided for by federal statute.

III. JURISDICTION

A. Federal Case

OPEC may be a "juridical person" for purposes of international law, but municipal statutes for the most part make no provision for international organizations in their respective definitional sections. Within the Sherman Act and the Clayton Act, a definition of "person" can only be found in Section 7 of the Sherman Act⁶² and Section 1 of the Clayton Act.⁶³ Both sections include in their definition "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." OPEC is an international organization within the international community but does not exist "under or authorized by law" except as the OPEC Statute exists in the laws of the creating States. Notwithstanding this fact, it must be remembered that international legal personality does not arise out of municipal law under the objective approach but only under the inductive approach. Therefore, under the inductive approach, OPEC may be an association which exists under the laws of a foreign country. OPEC certainly exists in the municipal law of its member States. However, "person" as defined in the Sherman and Clayton Acts is extremely broad and could encompass an international organization although a sovereign may not be a person within the meaning of the Sher-

a public international organization in which the United States participates pursuant to a treaty, by Act of Congress, or designation by the President by executive order.

61. 22 U.S.C. § 288a(b) (1976).

62. 15 U.S.C. § 7 (1976).

63. 14 U.S.C. § 12 (1976).

man and Clayton Acts.⁶⁴ Judge Hank in *International Machinists* held that a sovereign was not a person within the meaning of the Sherman and Clayton Acts and could not be a defendant in an antitrust action.⁶⁵ He relied primarily on *Parker v. Brown*⁶⁶ wherein the Supreme Court stated: "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."⁶⁷ Moreover, after reviewing the legislative history, the Supreme Court found the purpose of the Sherman and Clayton Acts to be the suppression of combinations in restraint of trade and monopolization by individuals and corporations.⁶⁸ This finding is not surprising considering that the Sherman and Clayton Acts were enacted in 1890 and 1914, respectively. This was a time when absolute sovereign immunity was the norm and states of the federal union did not engage in commercial activities. Later in this century sovereigns began engaging in activities which previously had been solely in the private sector as greater government participation in business was demanded to establish orderly markets and prevent depressions even to the extent of nationalization and government enterprises. The restrictive theory of sovereign immunity was not adopted in the United States until 1952 in the "Tate Letter."⁶⁹ The Foreign Sovereign Immunities Act clearly indicates that Congress has recognized that sovereigns do engage in commercial activities and should not be immune from suit when they do so. To hold that a sovereign cannot be a defendant in an antitrust action contradicts the intent of the Foreign Sovereign Immunities Act.

Whatever sensitive foreign policy matters may dictate judicial discretion with respect to allowing suit against a particular foreign sovereign, they should not be considerations when dealing with an international organization whose primary activity is commercial. At present, the status of an international organization, which is

64. In *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), *cert. den.*, 434 U.S. 984 (1977), the Court of Appeals noted that the Libyan government could not have violated the Sherman Act by allegedly conspiring against Hunt's oil concern because Libya "is not a person or corporation within the terms of the Act but a sovereign state." *Id.* at 78 n.14. But, a foreign sovereign is a person for purposes of Section 4 of the Clayton Act, 15 U.S.C. § 15, (1976), and may bring suit to recover damages for violation of Antitrust law. *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 318 (1978).

65. *Int'l Ass'n of Machinists*, *supra* note 4, at 570-72.

66. 317 U.S. 341 (1943).

67. *Id.* at 351.

68. *Id.*

69. 26 DEP'T STATE BULL. 984 (1952).

somewhere between a sovereign State and an organization authorized by municipal law, is uncertain.

Other United States federal statutes are more restrictive. The definition of "person" in Section 2(2) of the Securities Act of 1933⁷⁰ limits a person to "an individual, a corporation, a partnership, an association, a joint stock company, a trust, any unincorporated organization, or a government or political subdivision thereof." For purposes of the Securities Exchange Act of 1934, a "person" is "a natural person, company, government, or political subdivision, agency, or instrumentality of a government."⁷¹ An international organization might be considered an "instrumentality" of its member States under the inductive approach. Under the Foreign Corrupt Practices Act of 1977, an OPEC official apparently may be bought by a United States business since Congress did not consider international organizations within the scope of that Act.⁷² Only government officials, political parties, and political candidates are included within the 1977 Act.⁷³

As can be seen from this brief review of various United States federal statutes, international organizations do not fit neatly into the legal scheme envisioned by Congress. In this era of ever-increasing international agencies, particularly when the motivation for formation of the organization is economic rather than peace or welfare, Congress should adjust its thinking with respect to what constitutes a juridical person for purposes of United States statutes.

1. *The Inductive Approach.* Under the inductive approach to international legal personality, OPEC is not a person under the municipal law of the United States because it is neither a sovereign nor a recognized international organization. It would have a character similar to an unincorporated association within United States municipal law. Suit would have to be maintained against the individual sovereign members of OPEC. Both the defenses of sovereign immunity and act of state would be available to the individual members. While sovereign immunity is a plea with respect to the jurisdiction of the tribunal involved,⁷⁴ the act of state doctrine is an

70. 15 U.S.C. § 77b(2) (1976 & Supp. 1981).

71. 15 U.S.C. § 78c(9) (1976 & Supp. 1981).

72. Pub. L. No. 95-213, 91 Stat. 1494 (1977), 15 U.S.C. §§ 78 m, 78 dd-1, 78 dd-2, 78 ff (1976).

73. 15 U.S.C. §§ 78 dd-1, 78 dd-2 (1976).

74. Sovereign immunity is an affirmative defense which places the burden of proof to

affirmative defense to the action.⁷⁵ Successful application of the act of state doctrine, as is the case with sovereign immunity, depends upon whether the activity is classified as political (*jure imperii*) or commercial (*jure gestionis*).⁷⁶ Prevailing in a suit against a sovereign does not mean, however, that there exists a satisfactory remedy. Imprisonment, if authorized, of a foreign sovereign is out of the question.⁷⁷ A fine⁷⁸ may be levied but is not practical. First, a fine in the case of OPEC sovereigns would probably be *de minimis* in comparison to oil revenues of these oil producing sovereigns. Second, the United States could not compel another sovereign to pay the fine. Third, even if the fine was substantial and were to be paid, it would be passed on to consumers by way of higher prices. A judgment for damages would present the same problems as imposition of a fine. Injunction against future violation would also be unenforceable against a foreign sovereign. Condemnation and seizure of imported goods⁷⁹ would be an unsatisfactory remedy if the goods are a necessary part of the United States economy. Petroleum products are vital parts of the United States economy. It appears that winning the suit would be a hollow victory.

2. *The Objective Approach.* Under the objective approach to international legal personality, OPEC is an international person and subject to suit in federal court since it is not immune under United States municipal law. OPEC can be sued in federal court if jurisdiction can be obtained. Personal service of process would have to be made on the OPEC Secretary General as the legally authorized representative of OPEC.⁸⁰ The headquarters of OPEC

establish immunity on the foreign sovereign. See H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 17, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6616.

75. See e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977), cert. den., 434 U.S. 984 (1977); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

76. *Victory Transport v. Comisaria General*, 336 F.2d 354, 358 (2d Cir. 1964).

77. For Example, imprisonment for a period not exceeding three years is authorized on conviction for a violation of the Sherman Act. A sentence of at least three months but not more than one year is authorized on conviction for a violation of the Wilson Tariff Act of 1894. 15 U.S.C. §§ 1,2,8 (1976).

78. A fine up to the statutory limit of \$100,000 on conviction for violation of the Sherman Act or a fine of between \$100 and \$5,000 for violation of the Wilson Tariff Act of 1894 could be imposed. *Id.*

79. Condemnation and seizure of imported goods is authorized under the Wilson Tariff Act of 1894. 15 U.S.C. § 11 (1976).

80. OPEC STATUTE, *supra* note 18, art. 27.

is located in Austria.⁸¹ Rule 4(f)⁸² of the Federal Rules of Civil Procedure only provides for effective service of process within the territorial limits of the state in which the district court is located or when a statute of the United States provides for service beyond the territorial limits of that state. Personal service on OPEC is not possible under Rule 4(f) unless the federal statute provides for extra-territorial service.

In the 1979 case, *International Association of Machinists and Aerospace Workers v. OPEC*, suit was attempted against OPEC in federal district court in California for violation of the Sherman and Clayton Acts.⁸³ The court found that OPEC could not be served because: (1) under the provisions of the Foreign Sovereign Immunities Act of 1976⁸⁴ OPEC was not a sovereign state; (2) under the International Immunities Act⁸⁵ the United States does not participate in OPEC; and, (3) an executive order has not been issued granting OPEC international organization status.⁸⁶ Consequently, OPEC was dismissed from the suit by the court.⁸⁷

Section 5 of the Sherman Act⁸⁸ and Section 15 of the Clayton Act⁸⁹ authorize extraterritorial service only for suits brought by the government. In an antitrust suit brought by a private party there is no authorization under United States antitrust laws for service of process outside of the state in which the district court is located.⁹⁰ However, service may be made on a corporate defendant in an antitrust suit outside the state where the district court is located.⁹¹ But, OPEC is an international organization and not a corporation.

Rule 4(f) of the Federal Rules of Civil Procedure also applies to third party practice.⁹² It would not be possible to bring suit

81. See Headquarters Agreement, *supra* note 22.

82. Fed. R. Civ. P. 4(f).

83. Int'l Ass'n of Machinists, *supra* note 4. The Complaint alleged that OPEC and its members fixed the price of crude oil and that this constituted a *per se* violation of the anti-trust laws.

84. 28 U.S.C. § 1602 (1976).

85. 22 U.S.C. § 288 (1976).

86. 477 F. Supp. 560 (D.C. Cal. 1979).

87. *Id.*

88. 15 U.S.C. § 5 (1976).

89. 15 U.S.C. § 25 (1976).

90. *Orange Theatre Corp. v. Rayberstz Amusement Corp.*, 7 F.R. Serv. 12b.23, Case 4; 139 F.2d 871, 874-75 (3d Cir. 1944); *Rohlfing v. Cat's Paw Rubber Co., Inc.*, 15 F.R. Serv. 4f.22, Case 23; 99 F. Supp. 886, 892-93 (N.D. Ill. 1951).

91. Section 12 of the Clayton Act, 15 U.S.C. § 22 (1976). *Abrams v. Bendix Home Appliances, Inc.*, 14 F.R. Serv. 4f.22, Case 4, 92 F. Supp. 633 (S.D.N.Y.) (1950).

92. *F & M Skirt Co., Inc. v. Wimpfheimer & Bro., Inc.*, 1 F.R. Serv. 4f.22, Case 1; 27 F.

against a United States based oil company for violation of the anti-trust acts and have the oil company join OPEC as a necessary third party. In the absence of any provision for extraterritorial service of process in an antitrust action OPEC cannot be validly served.

Some federal statutes such as the Securities Act of 1933⁹³ and the Securities Exchange Act of 1934⁹⁴ provide for worldwide service of the process.⁹⁵ Service would be obtained by complying with the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents.⁹⁶ The Court would transmit the documents to the central authority designated⁹⁷ by the receiving State. The central authority will then serve the documents itself or arrange for the appropriate agency to do so⁹⁸ and then provide a return of service document.⁹⁹ If the request for service complies with the terms of the Hague Convention, the receiving State may not refuse to comply unless compliance would infringe upon its sovereignty or security.¹⁰⁰ The receiving State may not refuse even if under its municipal law subject matter jurisdiction would be exclusive in that State or if its municipal law would not permit such an action within that State.¹⁰¹ To obtain service of process on OPEC the documents would be forwarded to the central authority designated by Austria for service and return on the OPEC Secretary General at OPEC Headquarters.¹⁰²

Supp. 239 (D. MASS. 1939); *Miller v. Hano v. Kennedy*, 11 F.R. Serv. 4f.22, Case 1; 8 F.R.D. 67 (E.D. Pa. 1947).

93. 15 U.S.C. §§ 77a-77aa (1976).

94. 15 U.S.C. §§ 78a-78kk (1976 and Supp. 1981).

95. "...process in such cases [violations of the Securities Act of 1933 or the Securities Exchange Act of 1934] may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found." 15 U.S.C. §§ 77v, 77aa (1976).

96. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 (*in force* Feb. 10, 1969) [hereinafter cited as HAGUE CONVENTION].

97. Each signatory State shall designate a central authority to receive requests for service from other signatory States. *Id.* art. 2.

98. *Id.* art. 5.

99. *Id.* art. 6.

100. *Id.* art. 13.

101. *Id.*

102. Austria is a party to the HAGUE CONVENTION pursuant to art. 22, 20 U.S.T. 366, 658 U.N.T.S. 177, which provides that the HAGUE CONVENTION replaces arts. 1-7 of the Convention Relating to Civil Procedure, March 1, 1954, Austria, Belgium, Denmark, Federal Republic of Germany, Finland, etc., 286 U.N.T.S. 265.

B. Diversity Case

Obtaining jurisdiction over an international organization under diversity jurisdiction would be more difficult than under a federal statute. The diversity statute¹⁰³ does not recognize international persons other than sovereigns.¹⁰⁴ An international organization is not a citizen or subject of a foreign state. Rather, an international organization is an international person. The United Nations is not a United States citizen merely because its headquarters is located in New York City. Likewise, OPEC is not an Austrian citizen simply because its headquarters are located in Austria. It would appear that suit would have to be brought against the individual members of the organization to obtain diversity jurisdiction, much the same way that unincorporated associations are treated in diversity practice. An unincorporated association is not a juridical person for purposes of diversity jurisdiction even when it has the capacity to sue and be sued in its own name.¹⁰⁵ Suit must be brought against the membership.¹⁰⁶

The problem of personality aside, Rule 4(f) of the Federal Rules of Civil Procedure applies to diversity suits as well as federal cases.¹⁰⁷ Service under a state statute outside of the state in which the district court is located is also ineffective.¹⁰⁸ The only alternative left is *in rem* or *quasi in rem* jurisdiction. Personal service may be obtained on a nonresident defendant outside the state where the district court is located if property of the nonresident defendant was attached in a state court action and the case is subsequently removed to federal court by another defendant.¹⁰⁹ However, the viability of certain types of *in rem* or *quasi in rem* cases is questionable if not nonexistent after the case *Shaffer v. Heitner*.¹¹⁰ Cases in which the property only serves as a basis for state court jurisdiction

103. 28 U.S.C. § 1332(a) (1976).

104. *Id.* The federal court jurisdiction with respect to persons is limited to controversies between: "(1) citizens of different states; (2) citizens of a State, and foreign states or citizens or subjects thereof; and, (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

105. *Calagaz v. Calhoon*, 309 F.2d 248, 251-52 (5th Cir. 1962).

106. *Ex Parte Edelstein*, 30 F.2d 636, (2d Cir.), *cert. den.*, 279 U.S. 851 (1929).

107. *Wallach v. Shumacher*, 15 F.R. Serv. 4f.22, Case 2; 11 F.R.D. 541 (S.D.N.Y. 1951). *See supra* text accompanying notes 84 & 92.

108. *Barnhart v. John B. Rogers Producing Co.*, 13 F.R. Serv. 4f.22, Case 7; 9 F.R.D. 590 (W.D. Pa. 1950).

109. *Reiber v. Trailmobile Co.*, 16 F.R. Serv. 64.22, Case 1, 11 F.R.D. 431 (W.D. Mo. 1951).

110. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

and is otherwise not related to the cause of action are no longer constitutional.¹¹¹

The Fifth Amendment Due Process Clause “does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.”¹¹² The minimum-contacts standard enunciated in *International Shoe Co. v. Washington*,¹¹³ is the standard for determining whether the exercise of jurisdiction over the interests of persons is constitutional.¹¹⁴ In view of *Shaffer*, attachment of the property of an international organization solely for the purpose of acquiring jurisdiction is out of the question. Moreover, an international organization such as OPEC has no assets in the United States. All of the petroleum and petroleum products which were initially owned by the oil producing members as sovereigns have been sold to the oil companies before reaching the United States. OPEC itself never has title to the petroleum or petroleum products. Proceeds from the sale of the petroleum and petroleum products belong to the sovereigns and not OPEC. OPEC’s primary assets are its headquarters facilities and special fund. At least in the case of OPEC, attachment would be fruitless.

IV. CONCLUSION

Under either the inductive approach or the objective approach, OPEC has international legal personality, although the consequences of that assertion vary with the approach utilized. As an international person OPEC may sue and be sued in the United States federal courts. OPEC is not immune from suit either by statute, executive order, or customary international law because OPEC is engaged in commercial activities. Acquiring jurisdiction over an international organization is extremely difficult if not impossible unless jurisdiction is acquiesced in by the organization or unless a federal statute provides for extraterritorial service of process. Mere acquiescence by the international organization may not be enough because Congress, in the enactment of many federal statutes, did not contemplate the inclusion of international organizations within the definition of a “person.”

The ultimate question is whether the federal courts would en-

111. *Id.* at 208-09.

112. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

113. *Id.*

114. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).

tain a suit against an international organization, even where suit is authorized by statute, except in ordinary cases involving contracts or torts. "Where delicate, complex issues of international economic policy are involved, jurisdiction [of a case involving an international organization] should be denied."¹¹⁵ This situation is particularly true with respect to OPEC. Not only is the United States heavily dependent upon the importation of foreign oil,¹¹⁶ but the peace negotiations in the Middle East, where major OPEC members are located, are delicate and complex. The federal courts will probably defer to the executive branch on questions of international economic policy.

115. *Lutcher S.A. Celulose E Papel Candoi, Parana, Brazil, v. Inter-American Development Bank*, 253 F. Supp. 568, 570, *aff'd*, 382 F.2d 454 (D.C. Cir. 1966), 127 U.S. App. D.C. 238.

116. In 1979, approximately forty-three per cent of the crude oil consumed in the United States was imported. Cook, *OPEC Is Springing Another Trap*, *Forbes*, Oct. 29, 1979, at 30.