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Abstract

This Comment argues that, in cases where a government that the executive branch has not formally recognized seeks access to a U.S. court, the court should defer to executive branch judgment. Part I of this Comment reviews the development of the case law on foreign governments binging suit in U.S. courts. Part II discusses the Second Circuit's decision in National Petrochemical Co. of Iran v. The M/T Stolt Sheaf. Part III argues that determination of court access for a government not recognized formally by the United States is an executive branch function and should not be replaced by a court analysis of contracts between a foreign government and the United States. The Comment concludes that an executive branch statement of interest [. . .] best represents executive branch willingness to allow foreign government to bring suit in a U.S. court.

COMMENT

UNRECOGNIZED FOREIGN SOVEREIGN COURT ACCESS AFTER *NATIONAL PETROCHEMICAL CO. OF IRAN v. THE M/T* STOLT SHEAF

INTRODUCTION

U.S. courts have extended access only to recognized foreign governments.[1] Courts have looked for a formal statement of recognition by the executive branch to determine when a foreign government was entitled to bring suit.[2] The executive branch, however, currently does not see the need to recognize new governments because such recognition is often seen as an announcement of approval of the recognized government and of its conduct.[3] Because the executive branch no longer articulates the recognition of new governments, no matter how established, courts may run into difficulty in determining when foreign governments can sue in U.S. courts. This was the case in *National Petrochemical Co. of Iran v. The M/T* Stolt Sheaf,[4]

1. *See, e.g.*, Pfizer Inc. v. Government of India, 434 U.S. 308 (1978) (only governments recognized by and at peace with United States are entitled to access to U.S. courts); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) (suit may be maintained only by government that has been recognized by political department of U.S. government as authorized government of foreign state); The *Sapphire*, 78 U.S. (11 Wall.) 164 (1870) (French Emperor as legitimate successor to prior French government recognized by U.S. government, may maintain suit in U.S. court); King of Spain v. Oliver, 14 F. Cas. 577 (C.C.D. Pa. 1810) (No. 7,814) (court refused to determine if King of Spain, not having been recognized as King by the U.S. government, may maintain suit in U.S. court); CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 16, 99th Cong., 1st Sess. 564-67 (1987) [hereinafter CONSTITUTION ANALYSIS AND INTERPRETATION]. This privilege does not apply to a recognized government with which we are at war. *See Ex Parte* Don Ascanio Colonna, 314 U.S. 510 (1942); Caperton v. Bowyer, 81 U.S. (14 Wall.) 216, 236 (1871); Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 536 (1867); Pang-Tsu Mow v. China, 201 F.2d 195, 198-99 (1952), *cert. denied*, 345 U.S. 925 (1953); Trading with the Enemy Act, § 7, 50 U.S.C. app. § 1 (1982).

2. *See infra* notes 6-12 and accompanying text.

3. *Diplomatic Recognition A Foreign Relations Outline*, 77 DEP'T ST. BULL. 462-63 (1977) (in recent years United States has avoided use of recognition in cases of changes of governments and concerned itself with question of whether it wanted to have diplomatic relations with new government); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 reporter's note 1 (1988) [hereinafter RESTATEMENT THIRD].

4. 860 F.2d 551 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989).

where, the executive branch declined to recognize formally the Khomeini government, and the court looked at that government's contacts with the United States to determine whether to grant it access to U.S. courts.[5]

This Comment argues that, in cases where a government that the executive branch has not formally recognized seeks access to a U.S. court, the court should defer to executive branch judgment. Part I of this Comment reviews the development of the case law on foreign governments bringing suit in U.S. courts. Part II discusses the Second Circuit's decision in *National Petrochemical Co. of Iran v. The M/T* Stolt Sheaf. Part III argues that determination of court access for a government not recognized formally by the United States is an executive branch function and should not be replaced by a court analysis of contacts between a foreign government and the United States. This Comment concludes that an executive branch statement of interest ("Statement of Interest") best represents executive branch willingness to allow a foreign government to bring suit in a U.S. court.

I. *RECOGNITION AS A PREREQUISITE TO SUIT BY A FOREIGN GOVERNMENT*

In the United States, only those foreign governments that have been formally recognized[6] by the executive branch can

5. *See infra* note 159-66 and accompanying text.

6. The concept of recognition of foreign states and their governments developed from the political doctrines of the European monarchies and the rise of the modern nation-state. L. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS 13 (1978). During the late Middle Ages, the concept of legitimacy provided that the only legitimate ruler was the king, as he was the "chosen of God." *Id.* at 13. The concept later developed to provide that the only legitimate government was one that came to power in compliance with the established legal order of the state. *Id.* Using this theory as a basis, following the French Revolution, European monarchies banded together and agreed not to recognize governments created in open revolt. *Id.* This formed the basis for recognition practices. *Id.*

There are three major approaches to recognition of a foreign government.

The first is the modern approach, which looks at the following:

a. Whether the government is in de facto control of the territory and in possession of the machinery of the State;

b. Whether the government has the consent of the people, without substantial resistance to its administration, that is, whether there is public acquiesence to the authority of the government; and

c. Whether the new government has indicated its willingness to comply with its

bring suit in U.S. courts.[7] The executive branch is the sole branch of the government entrusted with the power to decide whether or not to recognize a foreign government.[8] This

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obligations under treaties and international law. 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 72-73 (1963).

The second approach, the Estrada Doctrine, enunciated by Mexican Foreign Minister Don Genaro Estrada in 1930, rejects the concept that one state or government can pass judgment on another by granting or withholding recognition. The doctrine considers such judgment an insult and instead concentrates on the maintenance or withdrawal of diplomatic relations. The doctrine was the result of a post-World War I policy that saw express declarations of recognition in the case of governmental change in Latin American countries, but no similar grants of recognition upon governmental change in European countries. L. GALLOWAY, *supra*, at 8-10. The doctrine is reprinted in 25 AM. J. OF INT'L L. SUPP. 203 (1931).

Third is the Tobar Doctrine, which requires that a government that comes to power through extraconstitutional means hold a free election and elect new leaders before recognition will be granted. This doctrine has had little acceptance. L. GALLOWAY, *supra*, at 10.

7. *See supra* note 1. The jurisdictional basis of diversity suits in federal courts is 28 U.S.C. § 1332, which provides in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between . . . a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332 (1982), *as amended by* Pub. L. 100-702, tit. II, §§ 201, 203, 102 Stat. 4646 (1988).

A "foreign state" is defined as "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a) (1982). Subsection (b) defines an agency or instrumentality as any entity

> (1) which is a separate legal person, corporate or otherwise, and
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> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (1982).

8. U.S. CONST. art. II, §§ 2-3. The President has the power to make treaties and appoint ambassadors with Senate approval and advice. *Id.* The Senate's role does not diminish the President's power, because the President has the sole ability to initiate these actions. J. HERVEY, THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW 19-21 (1928). Article II, § 3 gives the President the power to receive ambassadors. U.S. CONST. art II, § 3; *see* RESTATEMENT THIRD, *supra* note 3, § 204 (President under Constitution has exclusive authority to recognize or not recognize foreign governments). *See generally* CONSTITUTION ANALYSIS AND INTERPRETATION, *supra* note 1, at 561 (assessing history of executive branch's foreign affairs powers). The executive's foreign affairs powers have been upheld in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (in international relations, President is sole organ of federal government); Jones v. United States, 137 U.S. 202 (1890) (determination of whether an island is part of United States is foreign relations question and, therefore,

power derives from the executive's constitutionally-delegated foreign affairs powers.[9] The executive branch considers many factors in making its recognition decision, including whether the government to be recognized is in actual control of the state, whether it represents the will of the people, and whether the government to be recognized is willing to honor its international obligations.[10] Recognition has been withheld and court access has been denied where the executive branch has

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strictly executive power); and Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979) (as party constitutionally charged with responsibility of maintaining diplomatic relations, President had full authority to recognize People's Republic of China and to derecognize Taiwan).

9. *See* Pfizer Inc. v. India, 434 U.S. 308 (1978) (within exclusive power of executive branch to determine which nations are entitled to sue); National City Bank of N.Y. v. China, 348 U.S. 356 (1955) (status of government of Republic of China in our courts is for executive determination); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) (what government is to be recognized as representative of foreign country is political question, to be determined by political department); United States v. Baker, 24 F. Cas. 962 (C.C.S.D.N.Y. 1861) (No. 14,501) (courts must follow decision of executive as to which government is recognized); CONSTITUTION ANALYSIS AND INTERPRETATION, *supra* note 1, at 564-67. Recognition of a foreign government is not compulsory. RESTATEMENT THIRD, *supra* note 3, § 203. However, until recognition, a state of government exists, but only as to its citizens, not as to the rest of the world. *See* J. HERVEY, *supra* note 8, at 8-9. One commentator has suggested that recognition of a government is a legal decision and is not left to the recognizing state's discretion. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 87-97 (1947).

10. *See* L. GALLOWAY, *supra* note 6, at 14-15, 21. Thomas Jefferson initially expressed U.S. recognition policy in 1792, upon the fall of the French monarchy. His instructions to the U.S. ambassador in France became the foundation of early U.S. recognition policy. *Id.* at 14-15. Under Jefferson's test, recognition was granted, whatever the government's origin, on the basis of two criteria. *Id.* First, the government to be recognized should be in actual control of the entire governmental authority, and second, the government to be recognized should represent the will of the nation, substantially declared. *Id.*; *see* 2 M. WHITEMAN, *supra* note 6, at 68-69.

The first factor was stressed by the executive branch in an assumption that acquiescence of the people to a government's control meant that the second factor, the will of the people, was being served. *See* L. GALLOWAY, *supra* note 6, at 15. Other factors were considered by subsequent administrations, such as whether the government was willing to fulfill international obligations, whether the government was stable, whether the government truly represented the people's will, and whether free elections would be held. *Id.* at 17-29; M. WHITEMAN, *supra* note 6, at 69, 72-73.

There are several modes of recognition. J. HERVEY, *supra* note 8, at 18-19. Recognition may arise from a bilateral treaty entered into for that purpose, by a stipulation in a treaty entered into for other purposes, or by exchange of diplomatic agents. *Id.*; H. LAUTERPACHT, *supra* note 9, at 371-83. There are also limited situations where recognition may be implied. *Id.* at 405-06. However, implication of recognition should only occur where there is clear evidence of a state's intent to grant such recognition. *Id.*

not found such factors.[11] Until the executive branch has recognized a new government, the courts cannot recognize the existence of that new government.[12]

In *Russian Socialist Federated Soviet Republic v. Cibrario*,[13] recognition and, therefore, court access required the existence of friendly relations between governments.[14] The Supreme Court rejected this friendship requirement in *Banco Nacional de Cuba v. Sabbatino*,[15] stating that, because a court is unable to assess levels of friendship, the severance of diplomatic relations without a withdrawal of recognition does not preclude court access for that government.[16] After *Sabbatino*, courts have generally followed a no-recognition no-access policy, developing at the same time exceptions that would allow entities controlled and created by the unrecognized governments to sue when incorporated in the United States, or otherwise hav-

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11. *See, e.g.*, The *Hornet*, 12 F. Cas. 529 (C.C.N.C. 1870) (No. 6,705) (U.S. courts cannot recognize new government or admit its agents or representatives as parties with standing in judicial actions until executive has publicly recognized that new government); *see also*, Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); The *Penza*, 277 F. 91 (E.D.N.Y. 1921); The *Rogdai*, 278 F. 294 (N.D. Cal. 1920); The *Rogday*, 279 F. 130 (N.D. Cal. 1920); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923).

12. *See, e.g.*, Guaranty Trust Co. v. United States, 304 U.S. 126 (1938) (courts cannot recognize Soviet government until political branch grants such recognition); United States v. Baker, 24 F. Cas. 962 (C.C.S.D.N.Y. 1861) (No. 14,501) (recognition is political question and court must follow executive and legislative branch decision); *Cibrario*, 235 N.Y. at 255, 139 N.E. at 259 (Soviet government cannot bring suit in U.S. court until recognized by executive and legislative branch).

> [Recognition] involves the determination of great public and political questions, which belong to the departments of our government that have charge of our foreign relations,—the legislative and executive departments. When those questions are decided by those departments, the courts follow the decision, and, until those departments have recognized the existence of the new government, the courts of the nation cannot. . . . This has been the uniform course of decision and practice of the courts of the United States.

United States v. Baker, 24 F. Cas. 962, 966 (C.C.S.D.N.Y. 1861) (No. 14,501); *see* RESTATEMENT THIRD, *supra* note 3, § 204 (President's actions in recognizing or not recognizing a foreign government are binding on courts). This was clarified in later cases, where it was stated that the executive makes the recognition decision. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

13. 235 N.Y. 255, 139 N.E. 259 (1923).

14. *Id.* at 258-59, 139 N.E. at 260.

15. 376 U.S. 398 (1963).

16. *Id.* at 410.

ing standing to sue, or when there was a Statement of Interest filed by the executive branch.[17] Exceptions to this policy have been developed enabling entities controlled or created by the unrecognized governments to sue, although the governments themselves have not been allowed to maintain suit.[18] In the recent case of *Transportes Aereos de Angola v. Ronair*,[19] a state-owned corporation formed under the laws of an unrecognized government was given U.S.-court access based on a Statement of Interest filed by the executive branch.[20]

A. Cibrario: *Friendship as an Incident of Recognition*

In 1917, the executive branch recognized the provisional Russian government.[21] Later that year, the Russian Socialist Federated Soviet Republic (the "Soviet government") took control from the provisional government.[22] The executive branch, however, continued to recognize the provisional Russian government and its representatives in the United States as the official Russian government.[23] This situation continued until the United States recognized the Union of Soviet Socialist Republics in 1933.[24]

In *Russian Socialist Federated Soviet Republic v. Cibrario*,[25] the

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17. *See, e.g.*, Vietnam v. Pfizer Inc., 556 F.2d 892 (8th Cir. 1977); Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *see infra* notes 67-81 and accompanying text.

18. *See infra* notes 82-100 and accompanying text.

19. 544 F. Supp. 858 (D. Del. 1982).

20. *Id.* at 863-64.

21. Telegram from Ambassador Francis to the U.S. Secretary of State Robert Lansing (Mar. 26, 1917) (State Dep't File No. 861.00/296) (informing Secretary of State of acceptance of U.S. recognition of provisional government), *reprinted in* DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1211 (1917).

22. *See* R. BROWDER, THE ORIGINS OF SOVIET-AMERICAN DIPLOMACY 3-5 (1953).

23. *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 130 (1938); H. LAUTERPACHT, *supra* note 9, at 352.

24. *See* Circular Telegram from William Phillips, Acting U.S. Secretary of State, to All Diplomatic Missions Abroad (Nov. 17, 1933) (State Dep't File No. 711.61/365a) (informing U.S. missions abroad of according of recognition to Soviet government), *reprinted in* DEP'T OF STATE, 2 FOREIGN RELATIONS OF THE UNITED STATES 816 (1933). *See generally* R. BROWDER, *supra* note 22, at 127-35 (discussing recognition of Soviet government).

25. 235 N.Y. 255, 139 N.E. 259 (1923). Other cases arising out of the nonrecognition of the Soviet government include: *Guaranty Trust Co.*, 304 U.S. at 126 (while Soviet government was not recognized by United States from 1917-1933, provisional government was recognized and had standing to sue on Russian claims); The *Penza*,

Soviet government brought suit in the United States to recover funds in the hands of its U.S. purchasing agents.[26] The Soviet government claimed that it had standing to bring suit, because it was the de facto government of Russia.[27] The respondent disputed the Soviet government's claim, maintaining that lack of recognition by the executive branch precluded the Soviet government from maintaining suit.[28] The New York Court of Appeals held that foreign sovereigns do not sue in U.S. courts as a matter of right, but rather as a matter of comity.[29] The court defined comity as a reciprocal courtesy that exists between friendly nations.[30] One aspect of such courtesy is the right to sue in the courts of another nation.[31] The extension of comity is not within the discretion of the courts, because it is the comity of the nation, and not of the court, that is enforced.[32] Further, comity is subject to public policy, which may be interpreted by the courts but is fixed by the other branches of government.[33] Consequently, the courts only enforce for-

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277 F. 91 (E.D.N.Y. 1921) (court is bound to recognize only those governments recognized by executive); The *Rogdai*, 278 F. 294 (N.D.C. 1920) (court will not take property of recognized provisional Russian government and award it to unrecognized Soviet government). For a discussion of the denial of access to the Soviet Republic, see L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 140-98 (1933); Dickinson, *Recognition Cases 1925-1930*, 25 AM. J. INT'L L. 214 (1931); Dickinson, *Recent Recognition Cases*, 19 AM. J. INT'L L. 263 (1925); Tennant, *Recognition Cases in American Courts, 1923-1930*, 29 MICH. L. REV. 708 (1931); Comment, *Can an Unrecognized Government Sue?*, 31 YALE L.J. 534 (1922).

26. Russian Socialist Federated Republic v. Cibrario, 198 A.D. 869, 870, 191 N.Y.S. 543, 544 (App. Div. 1921).

27. *Id.* at 871-72, 191 N.Y.S. 544-45.

28. *Id.* at 871, 191 N.Y.S. 545.

29. *Cibrario*, 235 N.Y. at 262, 139 N.E. at 262.

> We reach the conclusion, therefore, that a foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity. Until such government is recognized by the United States, no such comity exists. The plaintiff concededly has not been so recognized. There is, therefore, no proper party before us.

Id.

30. *Id.* at 258, 139 N.E. at 260. The court quoted Webster's dictionary definition of comity. Webster's defines comity as, "in general terms that there are between nations at peace with one another rights both national and individual resulting from the comity or courtesy due from one friendly nation to another. Among these is the right to sue in their courts respectively." *Id.* at 258-59, 139 N.E. at 260 (quoting 6 WEBSTER WORKS 117). "[Comity] presupposes friendship. It assumes the prevalence of equity and justice." *Id.* at 258, 139 N.E. at 260.

31. *Id.* at 258-59, 139 N.E. at 260.

32. *Id.* at 259, 139 N.E. at 260.

33. *Id.* "This rule is always subject, however, to one consideration. There may

eign policy and do not determine it.[34] In the absence of formal recognition by the U.S. government, no such comity exists that would permit suit.[35]

The court stated that it found no cases where unrecognized governments were granted access to U.S. courts.[36] The court further stated that this is because comity cannot exist until a government is recognized.[37] Such recognition and, therefore, comity are political questions and the courts are bound by the branches of government in charge of those decisions.[38] The court concluded that the Soviet government could not maintain suit, because the branches of the U.S. government responsible for granting recognition had not recognized that government.[39]

B. Sabbatino: *Court Access After a Break in Diplomatic Relations—Friendly Relations Not Required*

When the regime of Fidel Castro came to power in Cuba in 1959, the United States recognized the new government quickly and expressed a willingness to pursue relations.[40] On

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be no yielding, if to yield is inconsistent with our public policy." *Id.* The court refers to recognition as fixed by the "other" branches of government. *Id.* This was clarified in later cases to mean the executive branch. *See supra* note 12 and accompanying text.

34. *Cibrario*, 235 N.Y. at 262, 139 N.E. at 262.

> We may add that recognition and consequently the existence of comity is purely a matter for the determination of the legislative or executive departments of the government. Who is the sovereign of a territory is a political question. In any case where that question is in dispute the courts are bound by the decision reached by those departments.

Id.

35. *Id.*

36. *Id.* at 260, 139 N.E. at 261.

37. *Id.* at 262, 139 N.E. at 262.

38. *Id.*

39. *Id.* The court stated that the relations of the United States with the Russian government were such that court access might be denied even if comity did not depend on recognition. *Id.* at 263, 139 N.E. at 262. In making this statement, the court cited explicit executive policy supporting a denial of court access. *Id.* The court pointed out executive statements critical of Soviet actions, such as the Soviet refusal to observe agreements with other nations, Soviet intent to promote revolt in other nations, and oppression of the Russian people. *Id.* at 263-65, 139 N.E. at 262-63. Additionally, the court cited the questionable nature of a policy that would allow a government with which the United States has bad relations to sue in the United States in order to recover funds that could be used to strengthen that government. *Id.* at 263, 139 N.E. at 262.

40. DEP'T OF STATE, SENATE COMM. ON FOREIGN RELATIONS, 88TH CONG., 1ST SESS., EVENTS IN UNITED STATES-CUBAN RELATIONS 1, 3 (Comm. Print 1963) (Castro

January 3, 1961, however, the United States severed diplomatic relations with Cuba as a result of increasing Cuban relations with the Soviet government and economic actions against U.S. interests in Cuba.[41] After the severance of diplomatic relations, the Cuban government brought suit in U.S. courts.[42] Defendants in these suits sought dismissal on the theory that the severance of diplomatic relations signalled the withdrawal of recognition.[43] U.S. courts faced with a recognized government with which the United States does not have diplomatic relations rendered inconsistent court decisions as to whether Cuba could bring suit.[44]

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proclaimed the provisional government on January 2, and the United States recognized it on January 7).

41. *Id.* at 19.

42. *See, e.g.*, P & E Shipping Corp. v. Empressa Cubana Exportadora e Importadora de Alimentos, 335 F.2d 678 (1st Cir. 1964) (action for failure to deliver shipment to Cuba); Pons v. Cuba, 294 F.2d 925 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 960 (1962) (action for money taken by Cuban national from Republic of Cuba); Rich v. Naviera Vacuba, 295 F.2d 24 (4th Cir. 1961) (libel against vessel and its cargo); Dade Drydock Corp. v. The M/T *Mar Caribe*, 199 F. Supp. 871 (S.D. Tex. 1961) (action for possession of vessel); Cuba v. Mayan Lines, 145 So. 2d 679 (La. Ct. App. 1962) (action for possession of vessel).

43. *See, e.g.*, *The M/T* Mar Caribe, 199 F. Supp. at 873 (defendant claiming arm of Cuban government, due to breach in diplomatic relations, cannot maintain suit in U.S. court); *Mayan Lines*, 145 So. 2d at 682 (appellee claiming dissolving of relations between United States and Cuba precludes suit by Cuban government). In P & E Shipping Corp. v. Banco Para el Comercio Exterior de Cuba, 307 F.2d 415 (1st Cir. 1962), the court raised, sua sponte, the issue of severance of diplomatic relations precluding access to U.S. courts. *Id.* at 417.

44. In some cases, the issue of whether severing diplomatic relations is the same as withdrawing of recognition was not addressed at all and suits were allowed to proceed. *See, e.g.*, *Pons*, 294 F.2d at 925; *Rich*, 295 F.2d at 24. In one case, where suit was initiated prior to the severance of diplomatic relations, the action was suspended until diplomatic relations resumed. *The M/T* Mar Caribe, 199 F. Supp. at 874. Prior to the Cuban situation, courts had suspended suits that had been initiated prior to a break in diplomatic relations. *See, e.g.*, China v. Merchant Fire Assurance Corp., 30 F.2d 278, 279 (9th Cir. 1929); Bank of China v. Wells Fargo Bank & Union Trust Co., 92 F. Supp. 920, 924 (N.D. Cal. 1950), *appeal dismissed*, 190 F.2d 1010 (9th Cir. 1951); France v. Isbrandtsen-Moller Co., 48 F. Supp. 631, 633-34 (S.D.N.Y. 1943). In another case involving Cuba, the court viewed diplomatic relations as distinct from recognition, and suit was allowed to continue on the theory that the United States still recognized Cuba. *Mayan Lines*, 145 So. 2d at 683. In yet another case, the court sought the input of the executive branch as to Cuban-U.S. relations, and the reciprocity of Cuban courts for the pursuit of similar actions by the United States. *P & E Shipping Corp.*, 307 F.2d at 418. The Supreme Court issued its decision in *Sabbatino*, 376 U.S 398 (1964), during the period *P & E Shipping Corp.* was on remand. Consequently, the court of appeals granted access to Cuba in *P & E Shipping Corp.* on the basis of the *Sabbatino* decision as well as the district court's determination on remand

The Supreme Court resolved this controversy in *Banco Nacional de Cuba v. Sabbatino*.[45] The Court restated the proposition, stated in *Cibrario*, that sovereign states sue in U.S. courts under principles of comity.[46] While courts have equated comity with friendly relations between states,[47] the Court stated that in practice, access to U.S. courts has only been denied to governments either at war with the United States or not recognized by the United States.[48] The respondents, relying on the reasoning of *Cibrario*, claimed that the unfriendliness of U.S.-Cuban relations indicated a lack of comity, and, therefore, court access should be denied.[49] The respondents equated breaking off of diplomatic relations with a withdrawal of recognition.[50] The petitioner argued that there are no degrees of recognition or friendliness and that if recognition exists, court access should be granted.[51]

The Court in *Sabbatino* distinguished recognition and comity from diplomatic relations.[52] While severance of diplomatic relations and nonrecognition may reflect similar feelings of unfriendliness,[53] the Court stated that nonrecognition has a

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that recognition of Cuba continued. *P & E Shipping Corp.*, 335 F.2d at 679; *see infra* notes 45-63 and accompanying text.

45. 376 U.S 398 (1963). This action was brought by the Cuban government for conversion of bills of lading. The Court stated that the issue of the denial of access to Cuba had been raised for the first time on this appeal. Nevertheless, closing of courts to the government of a foreign state is an issue that transcends the interests of the parties, therefore, the Court would have raised it sua sponte. *Id.* at 408.

46. *Id.* at 408-09.

47. *See* Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923). "Comity may be defined as that reciprocal courtesy which one member of the family of nations owes to the others. It presupposes friendship." *Id.* at 258, 139 N.E. at 260; *see also*, Bank of Augusta v. Earle 38 U.S. (13 Pet) 519, 589 (1839), *overruled on other grounds by* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

48. *Sabbatino*, 376 U.S. at 409. For cases denying access to unrecognized governments and to governments with which the United States is at war, see *supra* note 11.

49. *Sabbatino*, 376 U.S. at 410; Brief for Respondent Farr, Whitlock & Co. at 13-18, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (No. 16) [hereinafter Brief for Respondent].

50. Brief for Respondent, *supra* note 49, at 18.

51. Petitioner's Reply Brief at 3, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (No. 16) [hereinafter Petitioner's Reply Brief].

52. *Sabbatino*, 376 U.S. at 410-11.

53. *Id.* at 411. In fact, it is quite possible that a government could have better relations with a government that it has not recognized than with a government that it has recognized, but with which diplomatic relations have been broken. For example,

unique legal aspect.[54] Nonrecognition signifies that the United States is unwilling to accept the unrecognized government as speaking for the people it purports to control.[55]

The unpredictable nature of diplomatic relations, however, makes it a poor basis for determining court access.[56] The Court stated that courts are not competent to assess degrees of friendliness or lack of friendliness.[57] Absent a declaration of war, which is a clear statement of unfriendly relations, a recognized sovereign has access to U.S. courts regardless of the level of diplomatic relations with that sovereign.[58]

The Court further noted that recognition is a political question and exclusively an executive function.[59] The Court added that allowing suit in the case of nonrecognition may re-

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the United States recognized the government of Cuba, but maintained no diplomatic relations with that government and imposed major restrictions on trade with Cuba. SENATE COMM. ON FOREIGN RELATIONS AND HOUSE COMM. ON FOREIGN AFFAIRS, 96TH CONG., 1ST SESS., REPORTS SUBMITTED TO CONGRESS PURSUANT TO THE FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 1979, at 1, 168 (Jt. Comm. Print 1979) [hereinafter JOINT REPORT]. However, the United States does not recognize Angola, *id.* at 167, but carries on significant trade relationships with that country. *See* Transportes Aereos de Angola v. Ronair, 544 F. Supp. 858, 861 (D. Del. 1982) (State Dep't letter written for case states that US$638.6 million annual trade between Angola and United States makes United States one of Angola's largest trading partners). A similar situation of extensive relations with an unrecognized government can be found in U.S.-China relations during the early 1970s. *See* L. GALLOWAY, *supra* note 6, at 11.

54. *Sabbatino*, 376 U.S. at 410.

55. *Id.* On the issue of the government speaking for the people it purports to control, see H. LAUTERPACHT, *supra* note 9, at 124-36.

56. *See Sabbatino*, 376 U.S. at 410; Petitioner's Reply Brief, *supra* note 51, at 3.

> Within recent months we have witnessed statements from the Executive Branch critical of numerous countries: France, the Soviet Union, Haiti, and South Vietnam, among others. Yet such attitudes can, and frequently do, shift drastically as the exigencies of the situation demand. No court could assume the burden of deciding, on the basis of such Executive statements, whether, at any moment, any particular state is so unfriendly as to be denied access to our courts.

Id.

57. *Sabbatino*, 376 U.S. at 410. "This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence . . . ." *Id.*

58. *Id.*

> [W]e are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts. . . . Severance may take place for any number of political reasons, its duration is unpredictable, and whatever expression of animosity it may imply does not approach that implicit in a declaration of war.

Id.

59. *Id.*; *see supra* note 8.

sult in judicial-executive conflict, with the judiciary infringing on the executive's foreign affairs powers.[60] The severing of diplomatic relations alone does not reach a similar result.[61] This is because the executive branch has already stated that the government bringing suit is recognized and able to speak for the people it purports to control.[62]

Thus, in *Sabbatino* the Supreme Court modified *Cibrario*.[63] While foreign governments bring suit under principles of comity, courts do not look to the existence of diplomatic relations or friendship in determining court access.[64] The executive branch's recognition of a foreign government is the basis for bringing suit.[65] Because the United States had recognized the Castro regime and did not de-recognize it, the break in diplomatic relations did not prevent Cuba from bringing suit.[66]

C. *Applying* Sabbatino

In subsequent suits involving the governments of the German Democratic Republic ("East Germany" or the "GDR") and the Republic of Vietnam, U.S. courts continued to require recognition for court access. In *Federal Republic of Germany v. Elicofon*,[67] the Federal Republic of Germany ("West Germany") sought to recover paintings stolen during World War II.[68] The

60. *Sabbatino*, 376 U.S. at 410-11. For an argument that judicial-executive conflict will not result in all instances where an unrecognized government is allowed to bring suit, see the discussion of *Cibrario* in L. JAFFE, *supra* note 25, at 149-56.

61. *Sabbatino*, 376 U.S. at 410-11.

62. *Id.* at 411. The absence of any executive-judicial conflict is supported by the filing of an amicus curiae brief by the executive branch in support of Cuba's act-of-state claim in the litigation, which supports a conclusion that granting of court access would not frustrate executive policy. *Id.*

63. In doing so, the Court noted that the doctrine that nonrecognition precludes suit by a foreign government in all instances has been the subject of criticism. *Id.* n.12. However, the issue was not before the Court and it declined to discuss such a possibility. *Id.*

64. *See id.* at 410-11. *Contra* Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 258-59, 139 N.E. 259, 260 (1923).

65. *See Sabbatino*, 376 U.S. at 410-11.

66. *See id.*

67. 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

68. *Elicofon*, 358 F. Supp. at 749. *See* Recent Decisions, *Foreign Relations Law—Standing to Sue—Weimar Art Collection Denied Standing to Intervene Because It is an Agency of the German Democratic Republic, an Unrecognized Government*, 7 VAND. J. TRANSNAT'L L. 213 (1973) (discussing the *Elicofon* decision).

Weimar Art Collection (the "Collection"), a legal entity of East Germany, sought to intervene in the action, claiming ownership of the paintings at the time of the theft.[69] The United States, however, did not recognize the GDR.[70] Thus, the Collection tried to avoid the rule against court access for unrecognized governments by claiming it was not an arm of the GDR.[71]

The district court stated that the Supreme Court's analysis in *Sabbatino*, that nonrecognition manifests an unwillingness to acknowledge that a government speaks for the people it claims to control, supported denial of access to the GDR.[72] The court held, therefore, that the GDR, as an unrecognized government, had no standing to bring suit.[73] The court further stated that the Collection would similarly lack standing if it was an arm or instrumentality of the GDR.[74] In a supplemental opinion the court found that the Collection was an arm of the GDR.[75] Thus, the Collection was denied access to U.S.

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69. *Elicofon*, 358 F. Supp. at 749. In a similar situation, the Turkish Republic of Northern Cyprus sought permission to intervene in a suit to determine the ownership of four mosaics claimed to have been stolen from Cyprus. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., No. 89-304-C (S.D. Ind. Aug. 3, 1989) (WESTLAW, Fed. library, Allfeds file). The United States recognizes the Republic of Cyprus, and not the Turkish Republic of Northern Cyprus, as the government of Cyprus. *Id.* Judge James E. Nolan, of the Federal District Court of Indianapolis, denied the motion of the Turkish Republic of Northern Cyprus on the grounds that it is not recognized by the United States. *Id.* at 51. *See* Honan, *Trial to Decide Owner of Mosaics Begins*, N.Y. Times, May 31, 1989, at C15, col. 1.

70. *Id.* at 750. The Justice Department, acting on behalf of the State Department, filed a Suggestion of Interest that stated:

> 1. The United States Government does not recognize the East German regime.
>
> 2. The United States Government recognizes the Federal Republic of Germany as the only German Government entitled to speak for Germany as the representative of the German people in international affairs.
>
> 3. The United States Government recognizes the Federal Republic of Germany as entitled in this litigation to represent the Weimar Museum as trustee of its interests.

Id.

71. *Id.* For a discussion of the separate juridical entity exception, allowing entities formed by, but separate from, an unrecognized government to bring suit, see *infra* notes 82-86 and accompanying text.

72. *Elicofon*, 358 F. Supp. at 752. The court stated that the *Sabbatino* case called for a re-examination of the court access issue, and determined that *Sabbatino* held that only recognized governments could sue in U.S. courts. *Id.*

73. *Id.* at 753.

74. *Id.*

75. *Id.* at 756. The court found that the GDR's designation of the Weimar Art

courts.[76]

In *Vietnam v. Pfizer Inc.*,[77] the government of the Republic of Vietnam filed suit against the Pfizer drug company for alleged antitrust violations.[78] During the course of the action, the Republic of Vietnam surrendered unconditionally to the forces of North Vietnam, which formed the new state of the Socialist Republic of Vietnam.[79] The executive branch did not recognize the new state or a new government as the sovereign of the territory formerly known as the Republic of Vietnam.[80] The court dismissed the suit against Pfizer and held that the Republic of Vietnam had ceased to exist and no new government was recognized by the United States as the sovereign authority in that territory.[81]

Collection as a juristic personality was specifically done to avoid the rule denying court access to unrecognized governments. *Id.*

76. *Id.* at 757. The court's decision was a move away from the reasoning of Upright v. Mercury Business Machs., 13 A.D.2d 36, 213 N.Y.S.2d 417 (N.Y. App. Div. 1961), which suggested that an entity separate from an unrecognized government, yet owned by that government, may have access to U.S. courts. *See* Lubman, *Unrecognized Governments in American Courts*: Upright v. Mercury Business Machines, 62 COLUM. L. REV. 275, 305 (1962) (suggesting that permitting suit by entity of unrecognized government does not contravene any executive policy). For discussion of separate entities, see *infra* notes 82-86 and accompanying text.

In 1974, the United States recognized the GDR, and the Weimar Art Collection was permitted to intervene in the suit for the possession of the paintings. *See* Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982).

77. 556 F.2d 892 (8th Cir. 1977).

78. *Id.* at 893.

79. *Id.* This formed a new state, not just a new government. *See* Esper, *Communists Take Over Saigon; U.S. Rescue Fleet is Picking up Vietnamese Who Fled in Boats*, N.Y. Times, May 1, 1975, at A1, col. 8 (on surrender of South Vietnam).

80. *Pfizer*, 556 F.2d at 894. In Pfizer, Inc. v. Lord, 522 F.2d 612 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976), a letter from the State Department, in response to an inquiry as to the status of South Vietnam, stated that the U.S. government recognized no government of South Vietnam. *Id.* at 613 n.3. Seeing no probable change in the near future, the State Department recommended dismissal of the suit rather than suspension. *Id.* There have been cases where suit has been suspended until a change in relations occurs. *See, e.g.*, Dade Drydock Corp. v. The M/T *Mar Caribe*, 199 F. Supp. 871 (S.D. Tex. 1961) (opting to suspend suit during period of breaking off of diplomatic relations with Cuba until relations normalized); France v. Isbrandtsen-Moller Co., 48 F. Supp. 631 (S.D.N.Y. 1943) (suit suspended while state of war existed).

81. *Pfizer*, 556 F.2d at 895; *Today Show: Interview with Secretary Kissinger* (NBC television broadcast, May 5-8, 1975) (transcript *reprinted in* 72 DEP'T ST. BULL. 665, 667 (1975)) (United States cannot recognize the Vietnamese government until United States observes its conduct); *Public Broadcasting System: Interview with [President] Ford* (PBS television broadcast, Aug. 7, 1975) (transcript *reprinted in* 73 DEP'T ST. BULL. 377, 379 (1975)) ("[Vietnam's] current actions certainly do not convince me that we

D. *Exceptions to Non-Access for Unrecognized Governments*

Two exceptions have developed to the requirement that a government must be recognized to maintain suit in U.S. courts. In *Amtorg Trading Corp. v. United States*,[82] the court developed the separate juridical entity exception.[83] This exception, also known as the corporate exception, allows entities owned by unrecognized governments to have access to U.S. courts if the entity is sufficiently independent of the government.[84] The exception was employed to enable a New York corporation fully owned by the unrecognized Soviet Russian government to bring suit in U.S. courts, because the corporation was incorporated in New York and, therefore, was a New York citizen, regardless of the identity of its stockholders.[85] In *Elicofon*, the court rejected the corporate exception because it determined that the Weimar Art Collection was not a separate juridical entity.[86]

The second exception, which developed after the Civil War, is the de facto exception.[87] It was first proposed in *United*

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should recognize South Viet-Nam or North Viet-Nam."). On the U.S. refusal to recognize the new Vietnamese government, see *Seoul Bid Loses in U.N.'s Council*, N.Y. Times, Aug. 7, 1975, at A6, col. 1.

82. 71 F.2d 524 (C.C.P.A. 1934).

83. *Id.* at 528-29. This exception, while it has been mentioned in several federal court decisions, has not actually been applied positively by any federal courts in an instance where the separate entity is a corporation or other entity existing in the unrecognized state, as opposed to a corporation formed under the laws of the United States. This is because the entities have failed to meet the test's requirements. *See* Transportes Aereos de Angola v. Ronair, 544 F. Supp. 858, 863 (D. Del. 1982); Germany v. Elicofon, 358 F. Supp. 747, 753 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

84. *Elicofon*, 358 F. Supp. at 753.

85. *Amtorg*, 71 F.2d at 528-29. The court held that the case was a legal proceeding and, therefore, the court was not concerned with stock ownership or the stockholder's residence. *Id.* at 528. "In the case before us, the suitor is a corporation and, as such, is in all legal aspects, a citizen of the state of New York." *Id.* at 529. The court relied on other cases where the appellant was allowed to bring suit even though the courts were aware of the status of East Germany and the corporation's stock. *Id.*; *see* Amtorg Trading Corp. v. N.Y. Indemnity Co., 256 N.Y. 671, 177 N.E. 187 (1930), *aff'd without opinion*, 229 A.D. 772, 242 N.Y.S. 811 (N.Y. App. Div. 1930); *see also* Amtorg Trading Corp. v. Commission of Internal Revenue, 65 F.2d 583 (2d. Cir. 1933) (not commenting on unrecognized status of East Germany, but knew of it and allowed suit to proceed).

86. *Elicofon*, 358 F. Supp. at 752-53, 756.

87. De facto recognition is a form of recognition that is provisional and evidences the existence of some question as to the stability of the regime being recog-

States v. Insurance Cos.,[88] where the Supreme Court held that a corporation formed by the Confederate Georgia legislature had standing to sue.[89] The Court held that the Georgia legislature was not recognized de jure, but it had a de facto existence and its acts should be given effect if they did not further rebellion and were necessary to peace and good order.[90]

The de facto exception was again utilized in *Upright v. Mercury Business Mach. Co.*[91] The court had to determine whether the assignee of a debt owed to the unrecognized government of East Germany could bring suit in a U.S. court.[92] The defendant claimed that non-recognition of East Germany precluded suit by its assignee in U.S. courts.[93]

The court noted that an unrecognized government may have a de facto existence that is legally cognizable.[94] The court did not deem the nonrecognition of the East German government as determinative of whether the transaction would be denied enforcement in U.S. courts, so long as the government itself was not the suitor.[95] The court stated that the East German government itself could not sue, because that would be against the policy of the executive not to recognize legally that government.[96] An assignee, however, may maintain suit on the underlying transaction, unless it or the assignment violates na-

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nized. G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 75 (5th ed. 1967). De facto recognition has been held to preclude suit by the unrecognized de facto government on the basis that lack of diplomatic recognition, even if de facto recognition exists, precludes access to U.S. courts. *See* Lubman, *supra* note 76, at 298.

88. 89 U.S. (22 Wall.) 99 (1874).

89. *Id.* at 104.

90. *Id.* at 102-03.

91. 13 A.D.2d 36, 213 N.Y.S.2d 417 (N.Y. App. Div. 1961). For an analysis of this case, see Lubman, *supra* note 76.

92. *Upright*, 13 A.D.2d at 37, 213 N.Y.S.2d at 419.

93. *Id.* at 39, 213 N.Y.S.2d at 421.

94. *Id.* at 38, 213 N.Y.S.2d at 419.

95. *Id.* at 39, 213 N.Y.S.2d at 421. The court noted that to allow the government itself to sue would be recognition of legal status, but allowing a corporate instrumentality of that government to sue may not be. *Id.* at 41, 213 N.Y.S.2d at 423.

In a concurring opinion, Justice Steuer stated that an unrecognized government lacks the capacity to sue, as does a branch or arm of that government. *Id.* at 42, 213 N.Y.S.2d at 424 (Steuer, J., concurring). Any entity that performs governmental functions is a branch of an unrecognized government, including corporations. *Id.* The State Department makes the determination of whether a particular corporation is an entity of a government, as such a determination is a political question. *Id.*

96. *Id.* at 41, 213 N.Y.S.2d at 422-23.

tional or public policy.[97]

The corporate and de facto exceptions are not exceptions in the true sense. In the corporate exception, the suitor must be a corporation or entity that is sufficiently independent of the unrecognized government.[98] The de facto exception focuses on a private claimant enforcing private rights that fall outside of the scope of national policy.[99] Neither exception allows the unrecognized government itself to maintain suit.[100]

E. Transportes: *A Statement of Interest Exception?*

In *Transportes Aereos de Angola v. Ronair*,[101] the court allowed a corporation owned by the People's Republic of Angola ("Transportes") to bring suit in a U.S. court, even though the executive branch had neither recognized the government nor established diplomatic relations with it.[102] The suit was a breach of contract claim against Ronair, a U.S. corporation.[103] Transportes proposed four defenses to Ronair's motion to dismiss for lack of recognition of the Angolan government.[104] The court stated that Transportes may have fulfilled one of the

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97. *Id.* In Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974), the suitor was not an assignee of the unrecognized government, it was an arm of the government, and, therefore, it was not allowed to maintain suit. *Id.* at 752-53. The court stated that whether a corporate instrumentality of an unrecognized government could maintain suit is "not so clear." *Upright*, 13 A.D.2d at 41, 213 N.Y.S.2d at 423.

98. *See supra* notes 82-86 and accompanying text.

99. *See supra* notes 87-97 and accompanying text.

100. *See supra* notes 84, 95 and accompanying text.

101. 544 F. Supp. 858 (D. Del. 1982).

102. *Id.* at 863-64; *see* JOINT REPORT, *supra* note 53, at 167 (on U.S.-Angola relations). For an analysis of this case, see Note, Transportes Aereos de Angola v. Ronair, Inc.: *Nonaccess to U.S. Courts by Unrecognized Governments—A New Exception?*, 8 N.C.J. INT'L L. & COM. TRANSACTIONS 225 (1982-83).

103. *Transportes*, 544 F. Supp. at 860.

104. The four defenses were:

(1) Recognition is no longer a policy that the State Department practices, and therefore the judiciary should not base its decisions on the existence of a grant of recognition.

(2) 28 U.S.C. § 1332 makes no distinction between recognized and unrecognized governments for purposes of diversity jurisdiction.

(3) Transportes is a separate and distinct juridical entity and should be allowed to sue regardless of whether Angola is recognized or not.

(4) The transaction was a commercial transaction, and the Department of Commerce approved the transaction by issuing an export license. *Id.* at 860-61.

defenses, the separate corporate entity exception, but did not apply that exception.[105] It relied instead on a State Department letter seeking access for Transportes,[106] as well as the fact that the State Department and the Department of Commerce had allowed the plane sale to take place and had issued the license to Transportes for the plane's export.[107]

The court stated that the purpose of denial of court access to governments not recognized by the executive is to give full effect to that branch's sensitive political judgments.[108] The State Department letter showed that the executive branch had assessed the transaction and determined that access for Transportes was appropriate.[109] By allowing the suit, the court was giving full effect to executive political judgment.[110] The court found that an unrecognized government suing on a commercial transaction should be granted court access where the executive has specifically informed the court that access will not interfere with executive policy.[111]

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105. *Id.* at 863.

> It may well be that TAAG, although wholly owned by the Angolan government, is in fact a discrete and independent entity, which should not be subsumed within its parent government for purposes of this suit. The Court need not examine this question, however, because it believes that under the unique facts of this case, there are more compelling reasons why TAAG should be allowed to pursue its claims in this Court.

Id.

106. *Id.* The State Department letter stated:

> The United States does not maintain, and has never maintained diplomatic relations with the People's Republic of Angola. At the same time, the United States Government has not discouraged trade between the United States and Angola. The volume of trade between the two countries in 1980 was $638.6 million, making the United States one of Angola's largest trading partners. . . . In these circumstances, the Department of State believes that allowing access to U.S. courts by the Angolan Airline TAAG, a State-owned business enterprise, for the resolution of a claim arising out of a purely commercial transaction, would be consistent with the foreign policy interests of the United States.

Id. at 861.

107. *Id.* at 863.

108. *Id.*; *see supra* notes 6-9 and accompanying text.

109. *Transportes*, 544 F. Supp. at 863.

110. *Id.* at 863-64.

111. *Id.*

II. NATIONAL PETROCHEMICAL CO. OF IRAN v. THE M/T *STOLT SHEAF: PERMITTING SUIT BY AN UNRECOGNIZED SOVEREIGN*

The Court of Appeals in *National Petrochemical Co. of Iran v. The M/T* Stolt Sheaf[112] held that the unrecognized Iranian government may have access to U.S. courts.[113] The court held that an aggregate of contacts between the United States and Iran evidenced a strong suggestion of an implicit willingness on the part of the executive branch to allow Iran to bring suit.[114] The aggregate contacts examined by the court, when coupled with the executive branch Statement of Interest, required the granting of court access.[115]

A. *Background of United States-Iranian Recognition Controversy*

During 1978, the Iranian government of Shah Reza Pahlavi was beset by numerous uprisings and demonstrations by the followers of the exiled Ayatollah Ruhollah Khomeini.[116] As a result of the political unrest, the Shah left Iran on January 16, 1979, leaving a government of his choosing in control.[117] On February 1, Khomeini returned to Iran.[118] By February 11, Khomeini and his followers had ousted the Shah's government, placing Mehdi Bazargan in office as the new Prime Minister.[119] President Carter, in a news conference immediately following the rise of the new government, spoke of the hope

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112. 860 F.2d 551 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989).

113. *Id.* at 556.

114. *Id.* at 555.

115. *Id.* The Statement of Interest was filed by the executive branch pursuant to 28 U.S.C. § 517 (1982), which authorizes the Attorney General of the United States to attend to the interests of the United States in any pending suit.

116. U.S. HOUSE OF REPRESENTATIVES COMM. ON FOREIGN AFFAIRS, 97TH CONG., 1ST SESS., CONGRESS AND FOREIGN POLICY—1979, at 73-74 (Comm. Print 1980) [hereinafter CONGRESS AND FOREIGN POLICY]; *A Chronology of Major Events in Iranian Turmoil*, N.Y. Times, Feb. 12, 1979, at A12, col. 1 [hereinafter *Chronology*].

117. CONGRESS AND FOREIGN POLICY, *supra* note 116, at 73; B. RUBIN, PAVED WITH GOOD INTENTIONS: THE AMERICAN EXPERIENCE AND IRAN 242 (1980); *Chronology*, *supra* note 116, col. 2.

118. CONGRESS AND FOREIGN POLICY, *supra* note 116, at 74; B. RUBIN, *supra* note 117, at 248; *Chronology*, *supra* note 116, col. 3.

119. CONGRESS AND FOREIGN POLICY, *supra* note 116, at 74; B. RUBIN, *supra* note 117, at 242, 251; Markham, *Anarchy Widespread*, N.Y. Times, Feb. 13, 1979, at A1, col. 6.

for cooperation with the Bazargan regime,[120] but did not make a formal statement of recognition. The State Department later explained that the changes in the Iranian government did not affect the formal recognition of Iran.[121] In subsequent statements, State Department officials indicated the intent to maintain diplomatic relations with and recognition of the Bazargan government.[122] On November 6, 1979, the Bazargan government dissolved itself, conceding power to the Ayatollah Khomeini.[123] While the United States did not formally recognize the new government it did attempt to negotiate indirectly with the new government, with little success.[124]

On April 7, 1980, as a result of the Iranian government's failure to take measures to release the U.S. citizens being held hostage in Iran,[125] President Carter severed diplomatic rela-

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120. B. RUBIN, *supra* note 117, at 282; *Transcript of the President's News Conference of Foreign and Domestic Matters*, N.Y. Times, Feb. 13, 1979, at A14, col. 1. The President stated that he believed "the people of Iran and their Government will continue to be our friends . . . ." *Id.*

121. Smith, *Carter Says He's Prepared to Work with Teheran Leaders for Stability*, N.Y. Times, Feb. 13, 1979, at A1, cols. 4-5. "[The President] did not specifically recognize the new government—the State Department explained later that the formal recognition of Iran was unaffected by the change in government—but he said it was the American intention to 'honor the will of the Iranian people.' " *Id.* col. 5.

122. The State Department press spokesman, Hodding Carter III, stated that "[o]ur Ambassador has relayed to the Government in Iran our intention to maintain diplomatic relations with that Government. This is the formal declaration that our relations do continue . . . . We recognize that Government." Brief for Amicus Curiae the United States of America at 9, National Petrochemical Company of Iran v. The M/T *Stolt Sheaf*, 860 F.2d 551 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989) (quoting AM. BANKER, Mar. 1, 1979, at 3; NEWSWEEK, Feb. 26, 1979, at 26; Wash. Post, Feb. 17, 1979, at 1) (press briefing not officially released, but was reported in the publications listed above); *see* CONGRESS AND FOREIGN POLICY, *supra* note 116, at 74 (Secretary of State for Near Eastern and South Asian Affairs characterized U.S. policy toward new Iranian government as seeking close and friendly ties).

123. *See* CONGRESS AND FOREIGN POLICY, *supra* note 116, at 74. Bazargan resigned and was replaced by a token provisional government. The main forces in the Iranian government were Khomeini, the Revolutionary Council, and the militants holding the U.S. Embassy in Teheran. *Id.*; B. RUBIN, *supra* note 117, at 299, 310; Kifner, *Iran's Civil Government Out; Hostages Face Death Threat; Oil Exports Believed Halted*, N.Y. Times, Nov. 7, 1979, at A1, col. 8.

124. *See generally* B. RUBIN, *supra* note 117, at 300-36 (examining U.S.-Iranian relations following fall of Bazargan and rise of Revolutionary Council).

125. On November 1, 1979, Khomeini appealed to Iranian students to take action against the United States. On November 4, 1979, the U.S. embassy was seized and 100 U.S. citizens and embassy workers were taken hostage. *See* CONGRESS AND FOREIGN POLICY, *supra* note 116, at 74; B. RUBIN, *supra* note 117, at 298, 328-29.

tions with Iran.[126] Trade restrictions were instituted, Iranian diplomats were expelled from the United States, and visas issued to Iranians were invalidated.[127] The case of *National Petrochemical Co. of Iran v. The M/T* Stolt Sheaf[128] arose as a result of Iranian attempts to skirt the U.S. trade restrictions.[129]

B. *The District Court*

National Petrochemical Company of Iran ("NPC") commenced its action to recover losses incurred in an attempt to ship chemicals from the United States to Iran, via middlemen, in violation of the U.S. trade embargo.[130] The chemicals were purchased in the United States by a Geneva affiliate of a Hamburg company.[131] The chartered Liberian ship, M/T *Stolt Sheaf*, was to deliver the chemicals to Iran via Spain.[132] After war broke out between Iran and Iraq, however, the goods were diverted and resold in Taiwan.[133] After filing suit unsuccessfully in Hamburg and Rotterdam, NPC filed suit in the United States.[134] The defendant filed a motion to dismiss on the grounds that the plaintiff was an entity of the government of

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126. *See* B. RUBIN, *supra* note 117, at 330; *Transcript of Carter Statement on Iran*, N.Y. Times, Apr. 8, 1980, at A1, col. 2. " 'I have today ordered the following steps: First, the United States of America is breaking diplomatic relations with the Government of Iran.' " *Id.* at col. 2-3.

127. *Transcript of Carter Statement on Iran*, N.Y. Times, Apr. 8, 1980, at A1, col. 2.

128. 671 F. Supp. 1009 (S.D.N.Y. 1987), *rev'd*, 860 F.2d 551 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989).

129. National Petrochemical Co. of Iran v. The M/T *Stolt Sheaf*, 860 F.2d 551, 552 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989). The executive branch response to the hostage crisis resulted in broad trade restrictions. *See* Exec. Order No. 12,211, 3 C.F.R. 253 (1981), *reprinted in* 50 U.S.C. § 1701, at 149 (1982) (prohibiting direct or indirect import of goods or services from Iran into United States, except for material imported for news publication or broadcast); Exec. Order No. 12,205, 3 C.F.R. 248 (1981), *reprinted in* 50 U.S.C. § 1701, at 148 (1982) (prohibiting sale, supply, or other transfer by person within U.S. jurisdiction, of any items, commodities, or products, except food, medicine, medical supplies, and clothing for the relief of human suffering, to or for the use of Iran); Proclamation No. 4702, 3 C.F.R. 82 (1980) (prohibiting import into United States of crude oil from Iran); Exec. Order No. 12,170, 3 C.F.R. 457 (1979), *reprinted in* 50 U.S.C. § 1701 at 148 (1982) (blocking all property and interests in property of the government of Iran and its instrumentalities and entities that are or become subject to U.S. jurisdiction).

130. *The M/T* Stolt Sheaf, 860 F.2d at 552.

131. *Id.* The shipping documents were apparently fabricated to conceal the origin and destination of the cargo. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

Iran and, as such, unable to sue in U.S. courts, because the executive branch had not recognized the Khomeini regime.[135]

The court reviewed the principle that only recognized governments with which the United States is at peace may bring suit in U.S. courts.[136] Additionally, the court stated that deference must be given to the executive branch in determining which governments may sue.[137] The court stated it was undisputed that the Khomeini regime was not recognized at that time by the executive branch.[138] The court based its finding on a letter from the State Department filed in an unrelated Iranian action.[139] The letter stated that the United States had not formally recognized the Khomeini regime and had severed diplomatic relations with Iran on April 7, 1980.[140] The court held that nonrecognition mandates that the suit be dismissed with prejudice.[141] Moreover, the court found that NPC was a gov-

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135. National Petrochemical Company of Iran v. The M/T *Stolt Sheaf*, 671 F. Supp. 1009, 1010 (S.D.N.Y. 1987), *rev'd*, 860 F.2d 551 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989).

136. *Id.*; *see supra* notes 6-7.

137. *The M/T* Stolt Sheaf, 671 F. Supp. at 1010; *see supra* notes 6-12 and accompanying text.

138. *The M/T* Stolt Sheaf, 671 F. Supp. at 1010. The Bazargan government fell in early November 1979, conceding power to Khomeini. *See* Kifner, *supra* note 123. The Revolutionary Council then prepared an Islamic constitution, and elections were held in which Finance Minister Bani-Sadr was elected the first President of the Islamic Republic of Iran. *See* B. RUBIN, *supra* note 117, at 373-75.

139. *The M/T* Stolt Sheaf, 671 F. Supp. at 1010. The letter was filed in Iran Handicraft & Carpet Export Center v. Marjan Int'l Corp., 655 F. Supp. 1275 (S.D.N.Y. 1987).

140. *The M/T* Stolt Sheaf, 671 F. Supp. at 1010 (quoting Letter from U.S. Dep't of State to Ralph A. Matalan, Esq. (Dec. 26, 1985), *reprinted in* Iran Handicraft & Carpet Export Center v. Marjan Int'l Corp., 655 F. Supp. 1275, 1280 n.4 (1987)). The text of the letter stated:

> In response to your letter of December 13, 1985, the questions you posed and the answers of the State Department are as follows:
> "1. Has the United States recognized the Khomeini government of the Islamic Republic of Iran?"
> Answer: No
> "2. Did the United States sever diplomatic relations with Iran? If so, on what date were they served [sic], and have they been re-established since that date?"
> Answer: Diplomatic relations with Iran were severed by the United States on April 7, 1980, and have not been re-established.

Iran Handicraft & Carpet Export Center v. Marjan Int'l Corp., 655 F. Supp. 1275, 1280 n.4 (1987).

141. *The M/T* Stolt Sheaf, 671 F. Supp. at 1010 (citing Vietnam v. Pfizer, 556 F.2d 892 (8th Cir. 1977)); *see supra* notes 77-81 and accompanying text.

ernment agency performing a function for the Iranian government and, therefore, was not a separate juridical entity.[142]

C. *The Court of Appeals*

On appeal, the U.S. State and Justice Departments filed a joint brief as amicus curiae in support of Iran's right to sue.[143] In the brief, the executive branch argued that it had substantially discontinued the practice of extending formal recognition to new governments.[144] As a result, the executive branch reasoned that a new government is implicitly recognized where the U.S. government is silent.[145] Rather than seek a statement of formal recognition, the executive branch argued that the court should inquire whether the executive branch has expressed an intent to derecognize the Iranian government.[146] Absent such intent to derecognize, the brief stated, it is established policy that a break in diplomatic relations, as occurred with Iran, does not bar access to U.S. courts.[147]

The court stated that NPC and amicus conceded that the President never formally recognized the Khomeini government.[148] However, amicus curiae and NPC claimed that the

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142. *The M/T Stolt Sheaf, 671 F. Supp. at 1010. For a discussion of the separate juridical entity exception, see supra* notes 82-86 and accompanying text.

143. National Petrochemical Co. of Iran v. The M/T *Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989). The brief was filed pursuant to 28 U.S.C. § 517, which authorizes the Attorney General of the United States to attend to the interests of the United States in any pending suit. *See* 28 U.S.C. § 517 (1982).

144. Brief for Amicus Curiae the United States of America at 11, National Petrochemical Co. of Iran v. The M/T *Stolt Sheaf*, 860 F.2d 551 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989) [hereinafter Brief for Amicus].

145. *Id.* at 12-13.

146. *Id.* at 17.

147. *Id.* at 17-18.

> [W]hile no formal statement regarding "recognition" has issued from the Executive Branch with regard to the current government of Iran, Executive Branch officials explicitly recognized the first government of the Islamic Republic of Iran and have not explicitly or implicitly derecognized subsequent governments. The maintenance of litigation by the government of Iran in our courts is therefore consistent with the prior actions of the Executive.

Id.

148. National Petrochemical Co. of Iran v. The M/T *Stolt Sheaf*, 860 F.2d 551, 554 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989). The court did review several well-established rules in the area of recognition. *Id.* at 553-54. The court stated that a foreign government must be recognized by the United States in order to take advantage of diversity jurisdiction. *Id.* at 553. The court stated that the determination

absence of formal recognition is not dispositive of a government's access to U.S. courts, and the executive may recognize a government for purposes of bringing suit without any formal recognition of that government.[149] The M/T *Stolt Sheaf* claimed that formal recognition is necessary in order to maintain suit.[150] The court conceded that language in the Supreme Court decisions of *Sabbatino* and *Guaranty Trust Co. v. United States* arguably support allowing suit only where the government is recognized,[151] but stated that the absence of formal recognition did not bar access to U.S. courts for NPC.[152]

The court based its decision on two factors. First, the court noted that the formal recognition policy of the United States had altered.[153] The court stated that the State Department refrains from announcing recognition of new governments, because such announcements have been misinterpreted as statements of approval of those new governments.[154] As a result of this shift away from formal recognition, the court stated that recognition alone could not be the basis for determining a government's right to court access.[155]

The second reason behind the court's decision was that the power to deal with foreign governments outside of formal recognition is an essential element of the President's implied

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of recognition is left to the executive branch. *Id.* The court stated that such recognition is voluntary, but once it is granted, it is not removed until a new regime is recognized as the legitimate government of that state. *Id. But see* Vietnam v. Pfizer Inc., 556 F.2d 892 (8th Cir. 1977) (no new government of State of Vietnam was recognized by the United States upon fall of recognized government). Finally, the court noted that a break in diplomatic relations with a recognized government does not automatically result in denial of court access. *The M/T* Stolt Sheaf, 860 F.2d at 553-54.

149. *The M/T* Stolt Sheaf, 860 F.2d at 553-54.

150. *Id.* at 554.

151. *Id.* " '[T]he refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks . . . for the territory it purports to control.' " *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964)). " '[I]n conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government.' " *Id.* (quoting Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938)).

152. *Id.* at 554.

153. *Id.* (quoting 77 DEP'T ST. BULL. 462-63 (1977)); *see supra* note 3. One commentator claims recognition is merely used as a political tool, and it is ineffective and should be eliminated. L. GALLOWAY, *supra* note 6, at 152-53.

154. *The M/T* Stolt Sheaf, 860 F.2d at 554.

155. *Id.*

powers in the area of international relations.[156] The President must have the ability to permit access to U.S. courts, even to unrecognized governments, because the President alone has charge of foreign affairs.[157] The court found the situation between Iran and the United States to be a compelling example of why the President must have such powers, in view of the fluctuating relations between the two countries.[158]

Once the court determined formal recognition was not a prerequisite to maintaining suit, it next looked for signs of executive branch willingness to permit Iran to litigate.[159] The court looked to the Algiers Accords,[160] entered into to resolve the U.S.-Iranian hostage crisis;[161] the Iran-United States Claims Tribunal,[162] set up to adjudicate U.S.-Iranian disputes;[163] and the Treaty of Amity, Economic Relations, and

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156. *Id.* at 554-55; *see supra* note 8 and accompanying text.

157. *The M/T* Stolt Sheaf, 860 F.2d at 555.

158. *Id.*

> This case serves as an excellent example [of why the President alone must have charge of foreign affairs]. Relations between the United States and Iran over the past eight years have been less than friendly. Yet, the status of that relationship has not been unchanging. There have been periods of improvement, for example, release of the embassy hostages, and periods of worsening relations, most recently occasioned by the unfortunate downing of an Iranian civilian airliner by the U.S.S. Vincennes. It is evident that in today's topsy-turvy world governments can topple and relationships can change in a moment. The Executive Branch must therefore have broad, unfettered discretion in matters involving such sensitive, fast-changing, and complex foreign relationships.

Id.

159. *Id.*

160. The Algiers Accords include the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, and the Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 81 DEP'T ST. BULL. 1 (Feb. 1981) [hereinafter Algiers Accords], *reprinted in* 20 I.L.M. 224 (1981).

161. *The M/T* Stolt Sheaf, 860 F.2d at 555. The Algiers Accords were entered into to seek a resolution to the detention of the 52 United States nationals in Iran. *See* Algiers Accords, *supra* note 160.

162. Algiers Accords, *supra* note 160, at 3, *reprinted in* 20 I.L.M. at 230.

163. *Id.*; *see The M/T* Stolt Sheaf, 860 F.2d at 555. The Claims Tribunal was established because of the existence of judicial attachments on Iranian assets in the United States, preventing the return of assets to Iran even in the event of the Executive lifting the freeze on Iranian assets. Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1, 3-4 (1984).

Consular Rights Between the United States and Iran,[164] which the court stated was still in full force and effect.[165] The court conceded that none of these factors standing alone would necessarily be enough of a showing of executive willingness to allow Iran to proceed as a plaintiff, but considered in the aggregate, the contacts form a strong suggestion that the executive has shown an implicit willingness to allow the Iranian government to bring suit in a U.S. court.[166]

The court did not, however, base its decision solely on the aggregate theory. Instead, the Statement of Interest filed by the State and Justice Departments was relied upon by the court as additional proof of executive branch intentions.[167] The Statement of Interest stated that the Iranian government and NPC, as its instrumentality, should be afforded access to U.S. courts for the purpose of resolution of this action.[168] The court stated that the decision to allow suit was not arbitrary and the court was not allowing some suits by the unrecognized Iranian government while not allowing other suits by that government.[169] The court stated that the executive did not act arbitrarily when it expressly sought access for Iran after entering into treaties with that country and establishing the Iran-United States Claims Tribunal.[170]

Thus, the court in *The M/T* Stolt Sheaf allowed the unrec-

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164. Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853.

165. *The M/T* Stolt Sheaf, 860 F.2d at 555.

166. *Id.* "Considering these factors in the aggregate, and not in isolation, as integral components of the United States overall relationship to Iran, the above recited connections strongly suggest that the Executive Branch has evinced an implicit willingness to permit the government of Iran to avail itself of a federal forum." *Id.*

167. *Id.* In Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., No. CV 87-03673 RG (C.D. Cal. Jan. 14, 1988), the State Department also filed a Statement of Interest on behalf of Iran. In that action, the Iranian Defense Ministry was suing on an award of the Iran-United States Claims Tribunal, which the defendant refused to pay. The *Gould* court held that the Statement of Interest was an unequivocal request for Iranian court access, and the Supreme Court, in Pfizer v. Government of India, 434 U.S. 308 (1978), stated that it is the exclusive power of the Executive Branch to determine which nations are entitled to sue in this country. *Gould*, at 3-4.

168. *The M/T* Stolt Sheaf, 860 F.2d at 555; *see also* Brief for Amicus, *supra* note 144, at 19.

169. *The M/T* Stolt Sheaf, 860 F.2d at 555-56.

170. *Id.* "[A]s the sole branch authorized to conduct relations with foreign countries, the Executive clearly did not act arbitrarily." *Id.* at 556.

ognized government of Iran to maintain suit in a U.S. court on the basis of an aggregate of contacts and a Statement of Interest from the executive branch.[171] In doing so, the court stated it was effectuating executive policy by deferring to executive action.[172]

III. *IMPLICATIONS OF THE M/T* STOLT SHEAF

The court in *The M/T* Stolt Sheaf allowed Iran to bring suit in a U.S. court on the basis of an aggregate of factors and a Statement of Interest.[173] An aggregate test removes the process of recognition from the executive branch and allows the judiciary to determine when recognition has occurred. When a government has not been recognized, an executive branch Statement of Interest is the appropriate method of determining executive branch policy, as it provides an unquestionable statement of that policy.[174]

A. *The Problem with an Aggregate Factors Test*

The court in *The M/T* Stolt Sheaf looked at various contacts of the United States with Iran and, on the basis of these contacts, found a strong willingness of the executive branch to allow Iran to sue in a U.S. court.[175] The use of such an aggregate factors test is a novel approach in the area of access to U.S. courts for unrecognized governments. Past cases deferred to the executive on the issue of recognition and court access, but the intentions of the executive were ascertained by an explicit grant or withholding of recognition by the executive branch.[176] The court in *The M/T* Stolt Sheaf suggests that will-

171. *See id.* at 555.

172. *Id.* at 555-56.

173. *Id.* at 555.

174. *See* Transportes Aereos de Angola v. Ronair, 544 F. Supp. 858, 863-64 (D. Del. 1982).

175. *The M/T* Stolt Sheaf, 860 F.2d at 555.

176. *See, e.g.*, Vietnam v. Pfizer Inc., 556 F.2d 892 (8th Cir. 1977) (unrecognized government of Socialist Republic of Vietnam cannot maintain suit in U.S. court); Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (East German government, not recognized by executive branch, could not sue in U.S. court); The *Penza*, 277 F. 91 (E.D.N.Y. 1921) (executive branch refusal to recognize Soviet government precluding suit by that government in U.S. court); The *Rogdai*, 278 F. 294 (N.D. Cal. 1920) (executive branch refusal to recognize Soviet government precluding suit by that government in U.S. court); Rus-

ingness to allow suit may be developed by assessing relations between the United States and the unrecognized government instead of deferring to the executive.[177] This process of determining court access does not comply with the established principles of court access to unrecognized governments as set forth in the *Sabbatino* or *Transportes* decisions.[178] In *Sabbatino*, the court stated that it could not assess the level of relations that the United States has with a foreign government.[179] In *Transportes* the court looked solely to the executive Statement of Interest to ascertain the executive branch's willingness to allow Angola to bring suit.[180]

The court in *The M/T* Stolt Sheaf, in order to give full effect to executive branch determinations, should have relied solely on the executive branch Statement of Interest and not considered the applicability of arbitrary contacts with the Iranian government in allowing court access for that government. The proposition of an aggregate contacts test puts the determination of whether recognition has been granted in the hands of the court instead of the executive branch.[181] Established policy, though, leaves the method of determining recognition, as well as the actual act of recognition, to the executive branch.[182] The court in *The M/T* Stolt Sheaf itself discussed the importance of the need for executive branch freedom to

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sian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923) (executive branch refusal to recognize Soviet government precluding suit by that government in U.S. court). *But see* Transportes Aereos de Angola v. Ronair, 544 F. Supp. 858 (D. Del. 1982) (unrecognized government of Angola allowed to maintain suit on commercial transaction in U.S. court).

177. *The M/T* Stolt Sheaf, 860 F.2d at 555. For an analysis suggesting that courts should be free to undertake independent analysis of relations with a foreign government in order to determine U.S. court access, regardless of executive policy or even State Department objections (with limited exceptions for rebuttal by the executive), see Note, *Out from the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts*, 29 VA. J. INT'L L. 473 (1989).

178. Banco Nacional de Cuba v. Sabbatino, 376 U.S 398, 410 (1964) (courts cannot assess level of friendliness or unfriendliness of relations with another country); *Transportes*, 544 F. Supp. at 863-64 (Angolan government has access to U.S. courts where executive branch specifically requested such access).

179. *Sabbatino*, 376 U.S. at 410.

180. *Transportes*, 544 F. Supp. at 864.

181. Such action goes against the policy of recognition as an executive branch decision. *See supra* notes 6-12 and accompanying text.

182. *See supra* notes 6-10 and accompanying text.

deal with foreign powers.[183] The court stated that the executive branch must have the latitude to permit court access to unrecognized foreign governments.[184] Using an aggregate test, a court could extend access to an unrecognized foreign government based on the court's assessment of executive branch contacts with that government, rather than relying on a formal statement of the executive branch.[185]

In *Banco Nacional de Cuba v. Sabbatino*,[186] the Court modified the traditional policy as to suits by recognized governments.[187] The Court in *Sabbatino* stated that comity had been equated with friendly relations between states, but in practice court access had not been denied except to unrecognized governments and those with which the United States was at war.[188] *Sabbatino*, in examining the effect of a break in diplomatic relations, distinguished between friendship and comity.[189] The Court stated that comity does not require the existence of friendship between nations.[190] Suit depends not on friendship as evidenced by the existence of diplomatic relations, but on an executive branch grant of recognition, regardless of the state of diplomatic relations.[191]

Iran does not fit into the modified view espoused in *Sabbatino*, because the Bazargan government was formally recognized by the executive branch, but the subsequent Khomeini regimes were not.[192] The executive branch chose not to recognize the current Khomeini regime because of important foreign policy reasons. Factors such as the hostage situation, the

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183. National Petrochemical Co. of Iran v. The M/T *Stolt Sheaf*, 860 F.2d 553, 554-55 (2d. Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989).

184. *Id.* at 555.

185. The court in *The M/T* Stolt Sheaf denies that there is any arbitrariness in assessing contacts of the United States with a foreign nation. *Id.* at 555-56. One commentator stated that "granting of recognition is traditionally and appropriately an instrument of foreign policy that the Executive Branch is entitled to wield." Parloff, *2nd Circuit Permits Iran to Sue Shipper in U.S.*, Manhattan Law., Nov. 15-21, 1988, at 33. The commentator stated that there was "some innovation" in the government claiming that it could grant access in individual instances without regard to general inferences of recognition. *Id.*

186. 376 U.S 398 (1964).

187. *See supra* notes 45-66 and accompanying text.

188. *Sabbatino*, 376 U.S. at 409.

189. *Id.* at 409-10.

190. *Id.*

191. *Id.* at 410.

192. *See supra* notes 116-29 and accompanying text.

strong anti-U.S. sentiment espoused by the Khomeini government, the prevailing opinion of the U.S. public, and the difficulty in negotiating with the Iranian government all played a role in the executive branch decision to withhold recognition.[193] Formal recognition is no longer granted in all cases where new governments come into power.[194] Instead, the executive either does or does not continue relations with a new government.[195] This shift results from formal recognition grants, appearing to imply U.S. approval of newly-recognized governments.[196] The shift away from formal recognition, though, does not vest the courts with the power to determine what foreign governments may maintain suit.[197]

The recognition of a government, by whatever method, is an executive function.[198] If courts are left to examine foreign relations in order to determine what level of contacts exist, the executive's constitutionally delegated power is diminished.[199] An aggregate factors test equates the existence of a certain gray area of contacts with a U.S. government intent to recognize. This is contrary to past policy and to the *Sabbatino* decision. The Court in *Sabbatino* specifically stated that there is no connection between diplomatic relations and court access.[200] To consider U.S. contacts with a foreign government as the basis for standing in U.S. courts has the same effect as stating that the existence of diplomatic relations is determinative of court access. The aggregate test suggests that court access can be based on an assessment of diplomatic relations, and in doing so it ignores the Supreme Court's rejection of such a test.

B. *Statement of Interest*

The court in *The M/T* Stolt Sheaf did not follow the policy of deference to the executive Statement of Interest set out by the court in *Transportes Aereos de Angola v. Ronair*.[201] Such a pol-

193. *See generally* B. RUBIN, *supra* note 117, at 300-30.

194. *See supra* notes 144-47 and accompanying text.

195. *Id.*

196. *Id.*

197. Such a decision is reserved for the executive branch. *See supra* notes 6-12 and accompanying text.

198. *See supra* notes 6-10 and accompanying text.

199. On the executive's constitutional powers, see *supra* notes 6-9.

200. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409-10 (1964).

201. 544 F. Supp. 858 (D. Del. 1982).

icy ensures that there will be no mistake by the court as to executive intent. In *Transportes*, the court reasoned that the executive branch policy was clearly expressed by a letter to the court requesting access for the Angolan government.[202] The court granted access to an unrecognized government on the basis of an explicit executive branch request.[203] Such a request is not the same as the court in *The M/T* Stolt Sheaf reviewing, on its own, executive branch actions to determine implied executive branch policy. Executive branch intent was as clear in *Transportes* as it was in *The M/T* Stolt Sheaf through the Statement of Interest. The court should have ruled solely on the Statement of Interest rather than examining the executive branch's contacts with the foreign government.[204] Such action is not in conformity with the *Transportes* rationale. The court cannot give full effect to the executive branch's sensitive political judgment by assessing various contacts with an unrecognized government.

The court in *The M/T* Stolt Sheaf refers to the need for broad executive powers in foreign relations.[205] To effectuate these powers, courts should not decide how friendly or unfriendly a foreign government's relations with the United States are at any given moment.[206] The aggregate factors test proposed by the court in *The M/T* Stolt Sheaf, though, would vest courts with foreign affairs powers.[207] Such a practice is vague and may lead to conflicting results in different courts as to the right of access of the same government. Where unrecognized foreign governments bring suit, the courts should look to the executive branch for a Statement of Interest.[208] If the executive branch permits suit, it will not interfere with ex-

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202. *Id.* at 863.

203. *Id.*

204. In *The M/T* Stolt Sheaf, the court considered contacts that were not related in any way to the issue of court access. National Petrochemical Co. of Iran v. The M/T *Stolt Sheaf*, 860 F.2d 553 (2d. Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989); *see supra* notes 159-66 and accompanying text.

205. *See The M/T* Stolt Sheaf, 860 F.2d at 555-56.

206. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S 398, 410 (1964).

207. Conduct of foreign affairs is an executive function. *See supra* notes 6-10 and accompanying text.

208. *See* Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., No. CV 87-03673 RG (C.D. Cal. Jan. 14, 1988); Transportes Aereos de Angola v. Ronair, 544 F. Supp. 858 (D. Del. 1982).

ecutive policy.[209] If the executive branch denies access, however, executive policy will likewise be effectuated.[210] In either instance the courts will not be assuming an executive branch function by making an arbitrary cataloguing of the relative value of a country's relations with the United States.

CONCLUSION

The decision in *The M/T* Stolt Sheaf suggests that the recognition of a foreign government may be determined by the courts in the absence of a formal executive statement. Formal recognition, however, is an executive function and should be left to the executive branch. In the absence of a clear statement of recognition by the executive branch, the courts should seek a Statement of Interest from the executive branch to determine whether executive policy would be served by allowing an unrecognized government to bring suit in U.S. courts. To allow courts to determine such access may result in the conflict of executive and judicial actions, which the traditional policy of deference to the executive branch is meant to avoid.

*Jonas E. Herbsman**

209. *Id.* The *Restatement Third* states that, presumably, the President in withholding recognition of a regime, might decide that such denial should not preclude access to the courts. RESTATEMENT THIRD, *supra* note 3, § 205 comment a. This view supports a policy whereby the President is in charge of recognition decisions. A case-by-case determination by the President of court access for unrecognized governments would enable courts to function in such instances while at the same time avoiding court-implied recognition.

210. *See* Vietnam v. Pfizer Inc., 556 F.2d 892 (8th Cir. 1977); Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

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