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Standing to Sue for Unrecognized Foreign Governments: National Petrochemical Company of Iran v. MIT Stolt Sheaf

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Standing to Sue for Unrecognized Foreign Governments: *National Petrochemical Company of Iran v. M/T Stolt Sheaf*

For at least sixty-five years, the courts of the United States have followed a general rule that unrecognized foreign governments are without standing to sue. Several recent cases, however, have questioned the sometimes rigid application of this rule. In last year's *National Petrochemical Company of Iran v. M/T Stolt Sheaf* (*NPC*),[1] the Second Circuit departed from the traditional rule and granted the Iranian government standing to sue in the United States District Court for the Southern District of New York.

The court's analysis relied on two findings: first, that certain specific acts of the Executive, taken collectively, indicated executive willingness to deal with Iran sufficient to create an implied grant of standing; and second, that a statement included in a Justice Department *amicus* brief was a valid expression of the Executive's desire that the National Petrochemical Company be granted standing to sue.[2] Because the Second Circuit's analysis represents a significant new twist in an already ambiguous area of law, this casenote will review the *NPC* decision and suggest a formula for determining similar cases in the future.

As background, Part I of this note will briefly review the law of standing to sue as it pertains to unrecognized foreign governments. Part II will then review the facts of the *NPC* case as well as the Second Circuit's analysis and holding. Part III will discuss the legal impact of the *NPC* analysis on the prior case law in

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1. 860 F.2d 551 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1535 (1989).

2. In response to the court's reliance on the *Amicus* brief, M/T Stolt Sheaf filed a writ of certiorari in United States Supreme Court to review the following question:

> May the executive branch, in a single case, and for the purposes of that single case, bindingly direct an Article III court of the United States to accord access and standing to sue to a foreign government that has not been recognized by the United States, or to the instrumentality of such government.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at i, M/T Stolt Sheaf v. National Petrochemical Company of Iran, *cert. denied*, 109 S. Ct. 1535 (1989) (No. 88-1244).

this area. Finally, Part IV will suggest a new criteria for deciding similar cases in the future.[3]

I. THE LAW OF STANDING FOR UNRECOGNIZED GOVERNMENTS

Unrecognized foreign governments have traditionally been denied standing to sue in the United States.[4] In the past two decades, however, courts have recognized two exceptions to this rule: the independent corporation exception, and the *de facto* recognition exception.[5]

The independent corporation exception applies when an instrumentality of an unrecognized foreign government, usually a corporation owned exclusively by that government, seeks standing to sue in U.S. courts.[6] While this exception finds support in a few older cases[7] and in the Restatement,[8] it has lost vitality in recent years as it pertains to purely government-owned corporations.[9] The only remaining instance in which the exception applies is when the corporation is separated from the unrecognized

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3. This note will not discuss the relationship between National Petrochemical Company and the Iranian Government. For a discussion of the law with respect to independent entities existing under unrecognized sovereigns, see *infra* notes 5-10 and accompanying text. *See also* Federal Republic of Germany v. Elicofon, 358 F. Supp. 747, 756-757 (E.D.N.Y. 1970), *aff'd sub. nom.*, Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); Lubman, *The Unrecognized Government in American Courts*: Upright v. Mercury Business Machines, 62 COLUM. L. REV. 275, 291 (1984). This note will also omit the following: discussion of U.S. recognition of Iran as a state; cases arising from suits by non-sovereign nations, territories, and colonies, *see, e.g.*, Cedec Trading Ltd. v. United American Coal Sales, 556 F. Supp. 722 (S.D.N.Y. 1983) (holding that a corporation of the Channel Islands could sue under diversity jurisdiction in the federal courts); Windert Watch Co. v. Remex Electronics Ltd., 468 F. Supp. 1242 (S.D.N.Y. 1979) (denying standing to a Hong Kong corporation); Tetra Finance (HK) Ltd. v. Shaheen, 584 F. Supp. 847 (S.D.N.Y. 1984) (allowing standing to a Hong Kong corporation); instances in which recognition is withdrawn while a case is pending, *see* Republic of Vietnam v. Pfizer, 556 F.2d 892 (8th Cir. 1977); and the executive branch's criteria for recognizing foreign governments. For an excellent discussion of the history of recognition as well as present policy, see Note, Transportes Aereos de Angola v. Ronair, Inc.: *Nonaccess to United States Courts by Unrecognized Governments—A New Exception?* 8 N.C. J. INT'L L. & COM. REG. 225, 228-29 (1983) (hereinafter *Transportes*).

4. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 205 & note 1 (1987) (hereinafter RESTATEMENT). *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410-11 (1964); Lubman, *supra* note 3, at 280.

5. *See, Transportes, supra* note 3, at 231-32.

6. *Id.* at 232.

7. *See, e.g.*, Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934).

8. RESTATEMENT, *supra* note 4, at § 205 comment a.

9. *See* Lubman, *supra* note 3, at 301.

government to such an extent that it fairly qualifies as an independent entity.[10]

The *de facto* recognition exception presents a more complex and vital legal theory. This exception is that the acts of an unrecognized government within its borders and within its role as a sovereign government are recognized in the U.S. courts, "so long as they are not inimical to the aims and purposes of public or national policy."[11] This principle is used primarily "when private litigants and rights are involved and there is little danger of invading the domain of the political branch."[12] Thus, this exception effectively grants standing to independent, private parties even though the governments under which those parties exist would not have standing.[13]

Because National Petrochemical Company was undisputedly an instrumentality of the Iranian government, it did not fall within any recognized exception to the rule denying standing to unrecognized governments. Thus, the *NPC* case represents a new exception to the traditional rule: an implied grant of standing based on executive acts. A brief review of the *NPC* decision will more clearly set forth this reasoning.

II. THE National Petrochemical Company DECISION

A. *The Facts*

The dispute in *NPC* arose from a scheme involving National Petrochemical Company and several middle-eastern and European companies which was designed to circumvent President Carter's trade embargo and procure chemicals necessary to National Petrochemical's operation.[14] In the course of the scheme,

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10. *See* Federal Republic of Germany v. Elicofon, 358 F. Supp. 747 (E.D.N.Y. 1973). In the *NPC* case, the Second Circuit did not question the lower court's finding that the Iranian government was the sole owner of the National Petrochemical Corporation.

11. *See Transportes, supra* note 3, at 231. *See also,* RESTATEMENT, *supra* note 4, at § 205 note 4, and cases cited therein. The primary effect of this *de facto* recognition doctrine is that the U.S. courts will give effect to the acts and edicts of unrecognized governments dealing solely with private, local, and domestic matters, but will not give effect to that government's acts which extend beyond that nation's borders. *Id.*

12. *Transportes, supra* note 3, at 231.

13. *Id.* See also Transportes Aereos de Angola v. Ronair, Inc., 544 F. Supp. 858, 863 (D. Del. 1982), in which the court seems to blend the two exceptions: "some courts have indicated that separate juridical entities, which are not alter egos of the governments under which they are organized, may maintain suit in United States courts, even though their parent government would be unable to do so."

14. *NPC*, 860 F.2d at 552. *See also* Brief for Defendants-Appellees at 2-3, *NPC*, 860 F.2d 551 (1988) (No. 87-9022). The President's trade embargo, Executive Order 12205,

Rotexchemie Brunst & Co. ("Rotex") of Hamburg, Germany chartered a ship, the M/T Stolt Sheaf, from Parcel Tankers, Inc., a Liberian company, to deliver the chemicals, first to Barcelona, Spain, and then to Iran.[15] The outbreak of war between Iran and Iraq in September of 1980 prevented Rotex from delivering the chemicals to Iran, and Rotex subsequently transported the chemicals to Taiwan for resale.[16]

Having sued unsuccessfully in criminal and civil actions in both Hamburg and Rotterdam, National Petrochemical Company then brought an action in the United States District Court for the Southern District of New York, alleging fraud, conversion, and falsifying bills of lading, all in breach of legal obligations.[17] In an opinion dated October 27, 1987, Judge Owen dismissed the complaint on the grounds that National Petrochemical Company was a "wholly-owned entity of an unrecognized foreign government" and thus "not entitled to bring suit in the courts of the United States."[18] National Petrochemical Company appealed from this order to the Second Circuit Court of Appeals.

B. The Second Circuit's Analysis

The Second Circuit, with Judge Cardamone writing for a unanimous panel, began its analysis by citing Article III of the United States Constitution[19] and the statute creating diversity jurisdiction.[20] The court noted the general rule that "[i]n order to take advantage of diversity jurisdiction, a foreign state and the government representing it must be 'recognized' by the United States."[21] The court then reviewed the basis of executive

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was issued on April 7, 1980, in response to the taking of 52 American hostages by Iranian militants at the United States' Teheran embassy. To get around the embargo, the National Petrochemical Company scheme involved substantial fraud and deception before the chemicals could be purchased from the U.S. suppliers. 860 F.2d at 552.

15. *NPC*, 860 F.2d at 552.

16. *Id.*

17. *Id.* The defendants in each of these actions were M/T Stolt Sheaf, Parcel Tankers, Inc. and various affiliates in both the United States and Norway. *Id.*

18. 860 F.2d at 551 (citing the district court opinion: National Petrochemical Company of Iran v. M/T Stolt Sheaf, 671 F. Supp. 1009, 1010 (S.D.N.Y. 1987)).

19. Article III, § 2, cl. 1 extends the federal judicial power to "all cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

20. 28 U.S.C. § 1332(a)(4) (1982) (which provides diversity jurisdiction over any civil action arising between "a foreign state . . . as plaintiff and citizens of a State or of different States").

21. 860 F.2d at 553 (citing *inter alia* Pfizer Inc. v. India, 434 U.S. 308, 319-20

branch recognition,[22] both of foreign states and their governments,[23] noting particularly that severing diplomatic relations with a recognized government does not necessarily deny that government standing to sue in the U.S. courts.[24]

Turning to the issue of recognition, the court noted that the United States has never recognized the Khomeni government[25] and set forth to determine whether non-recognition conclusively deprives a foreign government of standing to sue.[26] Recognizing contrary authority,[27] the court nevertheless held that recognition was not dispositive for two reasons: first, in recent years, the United States has de-emphasized the importance of recognition

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(1978)). Because it was undisputed that Iran was recognized as a state, the issue of standing was built solely on the United States' refusal to recognize the Iranian government of the Ayatollah Khomeni.

22. The basis of recognition is found in the executive branch's exclusive authority to carry on international relations, as discussed in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-320 (1936). For analysis more specific to the facts of this case, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) ("political recognition is exclusively a function of the Executive").

23. *NPC*, 860 F.2d at 553.

24. *Id.* at 553-54. With respect to diplomatic relations, the court noted as follows:

> As the Supreme Court has observed, courts are hardly competent to assess how friendly or unfriendly our relationship with a foreign government is at any given moment, and absent some "definite touchstone for determination, we are constrained to consider any relationship short of war, with a recognized sovereign power as embracing the privilege of resorting to the United States courts."

Id. at 554 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964)).

25. The district court took judicial notice that the President has never recognized the Khomeni government based on a letter from the Assistant Legal Advisor for Management of the Department of State submitted in a similar case, Iran Handicraft & Carpet Export Center v. Marjan Int'l Corp., 655 F. Supp. 1275 (S.D.N.Y. 1987). The letter stated as follows:

> In response to your letter of December 13, 1985, the questions you posed and the answers of the State Department are as follows:
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> 1. Has the United States recognized the Khomeni 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 reestablished.

Id. at 1280, *cited in* National Petrochemical Company of Iran v. M/T Stolt Sheaf, 671 F. Supp. 1009, 1010 n.2 (S.D.N.Y. 1987)).

26. *NPC*, 860 F.2d at 554.

27. *See Id.* In particular, the court cited Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) ("The 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"), and Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 137 (1938) (prior to formal recognition, the Communist government of the Soviet Union was denied standing in United States courts).

when foreign states change governments;[28] and second, "the power to deal with foreign nations outside the bounds of formal recognition is essential to a president's implied power to maintain international relations."[29]

Looking beyond formal recognition, therefore, the court concluded that other executive acts should be examined to determine whether the Executive had "evinced a willingness to permit Iran to litigate its claims in the U.S. forum."[30] The court relied on three examples of executive-sanctioned intercourse between the United States and Iran in finding any implied grant of standing: the Algerian Accords, entered into to resolve the Iran Embassy hostage crisis; the on-going adjudication of disputes at the Iran-United States Claims Tribunal at the Hague; and the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, which remains in full force and effect.[31] Based on these "indicia of Executive Branch willingness" to allow Iran access to United States courts, the Second Circuit reversed the District Court.[32]

As a second grounds for its finding of executive willingness to allow Iran access to United States courts, the court relied on a statement of interest from an *Amicus* brief filed by the United States Justice Department which stated: "It is the position of the Executive Branch that the Iranian government and its instrumentality should be afforded access to our courts for purposes of resolution of the instant dispute."[33] The appellees argued that deference to such "*ad hoc, pro hac vice*" directives would "encourage arbitrary and unpredictable pronouncements"

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28. *NPC*, 860 F.2d at 554. The court cited as authority 77 DEPT. ST. BULL. 462-63 (1977); RESTATEMENT, *supra* note 4, at § 203 n.1.

29. *NPC*, 860 F.2d at 554-55. Here the court reasoned that separation of powers gives the executive sole control over all matters of foreign relations. Thus, if the judiciary were to construe a refusal to recognize as an absolute denial of standing to sue, the executive power to deal with foreign states and governments would be impaired. In support of this proposition, the court cited several cases stating that the President is the sole authority over all matters of foreign relations.

30. *Id.* at 555.

31. *Id.*

32. *Id.*

33. *Id.* (quoting United States Justice Dept. Brief *Amicus Curiae* at 19, *NPC*, 860 F.2d 551 (1988) (No. 87-9022)). This brief, signed by three State Department legal advisers, an Acting Assistant Attorney General, the United States Attorney for the Southern District of New York, and two attorneys from the Justice Department, was filed for the first time on appeal; thus the District Court ruled on the Motion to Dismiss without any executive direction of this nature. *See id. See also*, Brief of Defendants-Appellees at 2-3, *NPC*, 860 F.2d 551 (1988) (No. 87-9022).

by the Executive to manipulate the judiciary.[34] The court reasoned, however, that the statement in this case was not arbitrary, but was well founded in executive policy as evidenced by U.S. intercourse with Iran.[35] Thus, the court concluded its opinion with an order that the complaint be reinstated and the matter remanded to the district court for further proceedings.[36]

III. Analysis of the Law

The Second Circuit's holding demands reexamination of the law for two reasons: first, it has become extremely uncertain what role recognition plays in determining standing;[37] and second, assuming that recognition is no longer dispositive, the nature of executive acts sufficient to manifest an implied grant of standing is wholly without definition. This section will analyze the law by first defining the proper role of formal recognition in determining standing, and then, by examining the relationship between the courts and the executive branch and determining to what extent the courts may interpret executive acts as implicit grants of standing.

A. The Proper Role of Recognition

While the *NPC* decision attempts to downplay the role of recognition in modern interstate politics,[38] the history, recent application, and political realities of the recognition issue overwhelmingly demand that recognition be the starting point for determining foreign governments' access to United States courts. It is, however, also true that non-recognition can no longer be cast as an absolute bar to standing.

1. The history of recognition and standing

Since 1923,[39] the rule that unrecognized foreign governments are without standing to sue has been generally applied

34. *NPC*, 860 F.2d at 555.

35. *Id.* at 555-56.

36. *Id.* at 556.

37. As discussed *supra* in Part I, the uncertainty in this area of law stems from both the unclear role which recognition plays in U.S. foreign affairs and the indefinite scope of the exceptions to the rule denying standing to unrecognized governments.

38. *See supra* notes 26-29 and accompanying text.

39. *See* Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923) (holding, for the first time by an American court, that unrecognized foreign governments have no standing to sue in the United States Courts).

throughout the United States judicial system.[40] Indeed, the traditional rule has been that "American courts will not give effect to the acts of unrecognized governments unless it is clear to them that to do otherwise would be manifestly absurd."[41] Courts have applied this rule so consistently that only rarely have they evaluated the basis upon which the rule has developed.[42]

Although the precise point at issue in *NPC* has never been determined by the United States Supreme Court, the Court has, in other cases, approved this general rule. In determining a question of sovereign immunity, the Court in *Guaranty Trust Co. of New York v. United States*[43] concluded that the Soviet government, before recognition, had no standing to sue in United States courts.[44] The Court also cited with approval several examples of such denials of standing based on non-recognition.[45]

In *Banco Nacional de Cuba v. Sabbatino*,[46] the Court granted standing to sue to a Cuban corporation, although U.S. diplomatic relations with that nation had been severed. In dictum, the court recognized that absence of diplomatic relations and non-recognition are distinguishable because non-recognition "has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control."[47]

The plainest statement of the Supreme Court on this issue, however, was supplied in *Pfizer, Inc. v. India*.[48] In that case, the Court discussed separation of powers and the issue of recognition as follows:

> [T]he result we reach does not require the Judiciary in any way to interfere in sensitive matters of foreign policy. It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our

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40. *See* Lubman, *supra* note 3, at 280.

41. *Id.*

42. *Id.* at 275.

43. 304 U.S. 126 (1938).

44. *Id.* at 137.

45. *Id.* (citing *inter alia* The Penza, D.C., 277 F. 91 (E.D.N.Y. 1921); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923)).

46. 376 U.S. 398 (1964).

47. *Id.* at 410.

48. 434 U.S. 308 (1977) (holding that a foreign country is a person for purposes of the treble damages provisions of the Clayton Act).

> courts. . . . Nothing we decide today qualifies this established rule of complete judicial deference to the executive branch.[49]

This statement is not only the most recent Supreme Court comment on the issue, but is, in essence, a culmination of the history of the issue in a simple and unmistakable conclusion: recognition is the dominant factor in determining unrecognized countries' standing to sue.

2. *Recent application of the rule*

While U.S. emphasis on recognition as a tool with which to act in international relations has unquestionably decreased,[50] it is improper to conclude that recognition has lost all significance in determining standing. Notwithstanding the de-emphasis of recognition, the 1987 Restatement of Foreign Relations Law makes plain the continuing significance of recognition in U.S. policy. Section 205 declares that "Under the Law of the United States: (1) an entity not recognized as a state, or a regime not recognized as the government of a state, is ordinarily denied access to courts in the United States . . . ."[51] The comments accompanying that section similarly state that denying recognition implies "that the representatives of the entity or regime are to be denied the right to sue in courts in the United States."[52] Moreover, the Reporters' Notes to section 203 and 205 point out at least three recent examples where the Executive used recognition as a significant tool of international relations.[53]

That this interpretation of the Restatement represents accurate law becomes particularly apparent upon examination of

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49. *Id.* at 319-20 (citations omitted).

50. *See* RESTATEMENT, *supra* note 4, at § 203 n.1 (1987); 77 DEPT. ST. BULL. 463 (1977). The circuit court relied on both of these sources. *See supra* note 28 and accompanying text.

51. RESTATEMENT, *supra* note 4, at § 205(1).

52. *Id.* at § 205 comment a.

53. The reporters specifically noted the U.S. refusal to recognize the Soviet regime in Afghanistan, and the Vietnamese Heng Samrin regime imposed upon Kampuchea. *Id.* at § 203 note 2. More significantly, the reporters noted the role of formal recognition when the U.S. must choose between two separate regimes claiming to govern the same territory. *Id.* at § 203 note 1. To this end, they cited the recent recognition of the People's Republic of China in lieu of the Republic of China in Taiwan. *Id.* at § 203 n.3. This instance is particularly significant because the Taiwan Relations Act, a congressional measure following derecognition of Taiwan, included an express grant to the Taiwan government of standing to sue in the U.S. courts. *Id.* at § 205 note 4. Thus, the Act implies that absent an express grant, standing to sue would normally have been denied due to derecognition.

recent lower court cases. With the exception of the Second Circuit's decision in *NPC*, virtually every court examining the issue has begun with the fundamental principle that refusal to recognize implies a denial of standing to sue.[54]

3. Political realities

Perhaps recognition has maintained its important role in determining issues of standing in part because of the judiciary's inherent inability to ascertain executive intent.[55] Because recognition is the one executive act that reliably manifests United States willingness to accept a government as legitimate, de-emphasizing recognition as a starting point in determining standing, as encouraged by the *NPC* decision, only removes certainty from an already uncertain area of law.

4. The correct role of recognition

While recognition is a useful and even necessary starting point, it should not be completely dispositive. Instead, refusal to recognize should create, as a practical matter, a rebuttable presumption that an unrecognized government should be denied standing.

Several factors necessitate this type of flexible standard. First, allowing access to U.S. courts is a function of comity rather than law.[56] Thus, a flexible standard is necessary to allow the Executive operating room to deal with foreign nations outside the boundaries of recognition.[57]

Second, derecognition may not always manifest U.S. unwillingness to deal with a foreign government. In some instances,

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54. *See, e.g.*, Iran Handicraft & Carpet Export Center v. Marjan Int'l Corp. 655 F. Supp. 1275 (S.D.N.Y. 1987) (granting standing to a private party as a citizen of a recognized *state*); Cedec Trading Ltd. v. United American Coal Sales, Inc. 556 F. Supp. 722 (S.D.N.Y. 1983) (recognizing the rule, but granting standing to a corporation of the Channel Islands); Transportes Aereos de Angola v. Ronair, Inc., 544 F. Supp. 858 (D. Del. 1982) (allowing standing to an Angolan corporation pursuant to an express executive branch directive); Chang v. Northwestern Memorial Hospital, 506 F. Supp. 975 (N.D. Ill. 1980) (allowing a malpractice action instituted by a Taiwanese citizen after diplomatic relations with Taiwan had been severed).

55. The Second Circuit acknowledged this difficulty in *NPC*, 860 F.2d at 554 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964)).

56. *See* Pfizer, Inc. v. India, 434 U.S. 308, 318-19 (1977); *Sabbatino*, 376 U.S. at 409 (defining comity as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other").

57. The Second Circuit drew this same conclusion in *NPC*, 860 F.2d at 554. *See supra* note 29 and accompanying text.

absence of recognition stems from a foreign government's lack of complete sovereignty.[58] In others, political realities wholly unrelated to government relations effectively mandate derecognition.[59] Rigidly following a rule that non-recognition can be equated with unwillingness to maintain intercourse would make these situations politically impossible to manage.

Finally, equity demands, in some instances, that an unrecognized government be given a forum in which to pursue its claims. "It seems neither equitable to permit, and even help, an unrecognized government to bring funds into the United States and then refuse it a remedy when, according to United States law, a wrong is committed against them, nor equitable to allow a wrongdoer to unjustly enrich himself."[60] In simpler terms, when a claim arises from activity sanctioned by the United States government, the United States should create a forum in which that claim may be litigated.

For these reasons, the executive act of refusal to recognize should not be construed as an absolute bar to standing. Rather, refusal to recognize should create a strong but rebuttable presumption that the United States does not wish to carry on any intercourse with the unrecognized government. Accordingly, standing to sue would ordinarily be denied in the absence of convincing evidence that the Executive has effectively opened the courthouse doors.

B. Separation of Powers and Judicial Deference

To rebut the presumption created by lack of recognition, courts may be asked to infer from acts of the Executive that the United States government has evinced a willingness to allow the unrecognized government standing to sue. Because the Second Circuit's *NPC* decision was the first case to infer such a grant of

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58. Unless the territory and population under control of any government constitute a "state," as defined in Texas v. White, 74 U.S. 700, 720 (1868), a government cannot be officially recognized as a member of the international community. *NPC*, 860 F.2d at 553. One requirement of such a state is sovereignty. On this issue, an interesting line of cases began with Windert Watch Co. v. Remex Electronics Ltd., 468 F. Supp. 1242 (S.D.N.Y. 1979) (holding that a Hong Kong corporation was without standing in the U.S. courts because the of the President's failure to recognize Hong Kong as a sovereign state). This case was ultimately rejected as contrary to both law and common sense in Tetra Finance (HK) Ltd. v. Shaheen, 584 F. Supp. 847 (S.D.N.Y. 1984).

59. *See, e.g.*, the discussion of relations with Taiwan after the U.S. formally recognized the People's Republic of China, *supra* note 53.

60. *Transportes*, *supra* note 3, at 237.

standing from various acts of the Executive, this section will first discuss the basic separation of power premises upon which the issue is dependent and then examine the *NPC* decision with some greater particularity.

1. Separation of powers

It is well settled that the President holds exclusive authority to conduct foreign affairs for the United States.[61] Thus, courts have consistently held that it is beyond judicial competence to make judgments concerning United States foreign relations.[62] To this end, courts have agreed that the purpose of denying standing to unrecognized governments is "to give full effect to the decision of the executive branch to refuse to receive that government's diplomatic representatives."[63]

Thus, the problem with allowing courts to infer a grant of standing from executive acts other than recognition is that it necessarily involves a certain degree of subjective judicial interpretation.[64] Because such interpretation inevitably involves judicial judgments that substantively define executive will, however, such interpretation inevitably walks a fine line between objective assessment and subjective infringement on executive power.[65] Thus, to adequately avoid intrusions on executive function, the

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61. *See* U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). This power is grounded in the President's constitutional authority to "receive Ambassadors and other public Ministers," U.S. Const. Art. II, § 3, and to make treaties, U.S. Const. Art. II, § 2. *See Curtiss-Wright*, 299 U.S. at 319; Iran Handicraft & Carpet Export Center v. Marjan International Corp., 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987). RESTATEMENT, *supra* note 4, at § 204, states in part: "Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government . . . ."

62. Iran Handicraft & Carpet Export Center v. Marjan International Corp., 655 F. Supp 1275, 1277 (S.D.N.Y. 1987); Transportes Aereos de Angola v. Ronair, Inc., 544 F. Supp. 858, 862 (D. Del. 1982).

63. *Transportes*, 544 F. Supp. at 862. *See also* Pfizer, Inc. v. India, 434 U.S. 308, 319-320 (1977) (noting, on this point, an "established rule of complete judicial deference to the Executive Branch"); Federal Republic of Germany v. Elicofon, 358 F. Supp. 747, 752 (E.D.N.Y. 1972) (granting standing to an unrecognized country is, in essence, an implicit judicial recognition which unconstitutionally encroaches on presidential power).

64. The *NPC* decision is an excellent example of this situation. *See supra* notes 30-32 and accompanying text.

65. *See* Lubman, *supra* note 3, at 306 (discussing the need for less judicial interpretation and more communication between the judicial and executive branches); *Transportes*, 544 F. Supp. at 862-63 (discussing in detail the need for a strict separation of powers in this area).

judiciary must refrain, whenever possible, from interpreting executive acts as expressions of will.

2. *The Second Circuit in* NPC

The *NPC* decision is an excellent example of the judiciary defining executive will under the guise of interpretation. The court inferred from three instances of executive intercourse with the Iranian government that the Executive intended United States courts to be open to that government.[66] The liberty with which the court reached this conclusion is best illustrated in the language of the decision itself:

> Standing alone, none of these indicia of Executive Branch willingness to allow Iran to proceed as a plaintiff in the United States courts would necessarily persuade us to reverse the district court and grant access. 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.[67]

There are two significant flaws in the court's analysis. First, the court's conclusion was hastily drawn. The court implied that adding together several "indicia" that fall short of indicating executive willingness to allow standing[68] somehow add up to a manifestation of executive will. This analysis, however, taken to its logical end, effectively licensed the court to take United States policy further than any component of the Executive had yet been willing to go. A more reasonable, or at least more deferential, conclusion might be that the courts' authority to deal with unrecognized governments cannot go beyond the limits controlling individual executive dealings. Thus, where no individual act of the Executive manifests a willingness to grant

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66. *See supra* note 31 and accompanying text.

67. *NPC*, 860 F.2d at 555.

68. The examples cited by the court clearly do not encompass the right to sue in U.S. courts. The Algerian Accords were entered for the limited purpose of resolving the hostage crisis and were narrowly limited to that single issue. The Iran-United States Claims Tribunal at the Hague does nothing either expressly or implicitly to "recognize" the Khomeni government, but rather serves only the politically necessary function of resolving a limited scope of international claims. Finally, the 1955 Treaty of Amity, Economic Relations, and Consular Rights, while it ostensibly remains in effect, has to a great extent been mooted by U.S. refusal to recognize the Khomeni government.

standing, standing should not be inferred from the cumulative effect of all executive dealings taken together.

Second, since none of the cited examples of intercourse with Iran are directly related to access to the United States courts, inferring such a relationship represents a degree of interpretation that creates a substantive right. By doing so, the court essentially makes foreign policy and thus encroaches on an exclusive function of the Executive. Therefore, the *NPC* court's holding that the Executive had impliedly recognized the Iranian government disregards established law and runs contrary to the traditional understanding of the separation of powers.[69]

Beyond the court's analysis of executive acts and implicit recognition, the court also relied on an executive branch statement, submitted for the first time in an *amicus curiae* brief with the Second Circuit, which stated the executive position that Iran should be granted standing in this case.[70] Under the above analysis, judicial adherence to this directive was appropriate deference to executive will. Express directives from the Executive are unambiguous and require no judicial interpretation. They represent the political judgments of the executive branch which cannot be properly made by courts.[71] Thus, in this area of exclusive executive power, courts have no choice but to defer to the Executive.[72]

The appellees argued that relying on an individual executive directive represents an "*ad hoc, pro hac vice*" directive that "encourage[s] arbitrary and unpredictable pronouncements on the status of foreign governments."[73] The court's consideration of

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69. Perhaps this rationale might best be illustrated by supposing hypothetically that the Justice Department had expressed an executive intent to deny standing. In this situation, the Second Circuit's reliance on executive acts as a manifestation of intent would have been conspicuously inconsistent with its expressed desire to follow executive intent. That the Executive could easily have taken such a position in this case underscores the danger of inferring too much from executive acts.

70. *NPC*, 860 F.2d at 555. *See also supra* text accompanying notes 33-36.

71. *See Transportes*, *supra* note 3, at 238.

72. Because the expression of executive intent is even more specific than the broad statement of refusal to recognize, it provides a much more certain indication of executive will. See Lubman, *supra* note 3, at 231-32, for a discussion of the value of relying on a State Department letter to the court as a manifestation of executive intent. *See also* Note, *Suits by Unrecognized Governments*, TEX. INT'L L.J. 226, 231-32 (1984) (discussing the recent importance attached to specific expressions of executive intent as determinative evidence of standing to sue).

73. *NPC*, 860 F.2d at 555-56. It is this issue particularly upon which the M/T Stolt Sheaf *et. al.* sought certiorari in the Supreme Court. In light of the above analysis, it may be that the petitioners sought certiorari on the wrong issue.

this executive statement, however, finds support in the Executive's exclusive authority to make pronouncements on the status of foreign governments and the proposition that the judiciary's function is not to erect impediments to the exercise of that authority.[74] The Executive's power to deal with foreign nations must remain unfettered, even if it means allowing the possibility that the Executive will not always act in a rational manner.

The appellee's contention that the directive purported to be limited to this single case[75] is similarly irrelevant. It is comity, not the heavy hand of the judiciary, that controls access to United States Courts.[76] Thus, the sole limit on arbitrary and unpredictable pronouncements of the Executive is the political reality that the United States must function as a responsible actor in the international community. Judicial attempts to force the Executive to do so plainly violate longstanding principles of separation of power.

Finally, the concern that executive pronouncements may be unpredictable is minimized by the fact that allowing judicial decision making would be ultimately much more unpredictable. There is only one executive, and presumably, its acts would be somewhat consistent. On the contrary, judicial uniformity throughout the thousands of courts that make up the United States judicial system is patently impossible.[77] In light of this circumstance, the Constitution wisely vested foreign policy authority in the hands of the Executive.

IV. Conclusion—A New Criteria for Determining Standing

Based on the above analysis, it is apparent that the once rigid but now confusing law of standing to sue with respect to

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74. Thus, the appellees argument that the *amicus curiae* brief is in reality *dominus curiae*, Petition for a Writ of Certiorari, *supra* note 2, at 5, may be answered in simple terms: where it is the exclusive responsibility of the Executive to make a political judgment, an expression of that judgment to the judiciary is proper and binding.

75. Appellees vigorously argued that because the executive statement included the words "for purposes of the instant dispute," *NPC*, 860 F.2d at 555, the directive would be limited to this one case, the executive could proceed to arbitrarily deny standing in the next case and allow it in the next two and so on. *See* Appellees' Brief at 16-18, *NPC*, 860 F.2d 551 (1988) (No. 87-9022).

76. *See supra* note 55 and accompanying text.

77. Appellees argued that the executive statement lacked proper authority and was not timely made. *See* Brief of Defendants-Appellees at 17, *NPC*, 860 F.2d 551 (1988) (No. 87-9022). As the court did not address either issue, this note will likewise not pass judgment on these peripheral matters.

unrecognized governments must be redefined. No criteria for making such determinations can be completely air-tight, but it may be possible to formulate a system in which the interests of judicial deference and executive will might both be adequately served. The following may represent one such possibility:

First, executive recognition must remain the beginning point of the analysis. If a country is recognized and not at war with the United States, then standing should be virtually guaranteed. Where the United States has refused to recognize a government or withdrawn recognition, however, there must be a strong presumption created that access to courts of the United States will be denied unless a strong showing can be made that countervailing factors indicate an implied or express grant of standing.

Second, where there is a direct statement from the Executive that plainly expresses an intent to grant an unrecognized standing to sue, the courts should give full effect to that expression. Only where such an expression is shown to be based on an erroneous understanding of the facts or to be otherwise unreliable or void should courts undertake to second-guess the Executive in these matters.

Finally, when examining indirect executive acts, the touchstone for determining whether a specific act constitutes an implicit grant of standing to an unrecognized government must be that the Executive plainly manifests an intent to grant standing or that standing would be necessary to effectuate the intent of the executive action. Thus, the primary inquiry would be whether any individual executive dealing defines a scope of dealing with the unrecognized government that necessarily includes a right to sue in the courts of the United States.

Under this analysis, the Second Circuit ruling that National Petrochemical Company of Iran should be granted standing to sue was correct on the narrow basis that the court must adhere to a direct expression of executive will. The court's implication that executive intercourse with Iran sufficiently manifested an implied grant of access, however, represents a dangerous path down which courts might travel to the detriment of our constitutionally defined separation of powers. To the extent that it can be read as permitting the courts to subjectively interpret executive will, *National Petrochemical Company of Iran v. M/T Stolt Sheaf* should not be followed.

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