# PRICE-FIXING AT THE PUMP—IS THE OPEC OIL CONSPIRACY BEYOND THE REACH OF THE SHERMAN ACT?

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## I. INTRODUCTION

In both the U.S. Senate and the U.S. House of Representatives, resentment has been building[1] against the

1. *See e.g.*, *Organization of Petroleum Exporting Countries (OPEC) Oil Prices and Policies and their Effects on the U.S. Economy: Hearing of the House Int'l Relations Comm.*, 106th Cong. (2000); *see generally Solutions to Competitive Problems in the Oil Industry: Hearings Before the House Comm. on the Judiciary*, 106th Cong. (2000) (prepared statement by Richard G. Parker, Director, Bureau of Competition, Federal Trade Commission) (responding to the Committee's request for an analysis of OPEC and OPEC member liability under U.S. antitrust laws); *see also Solutions to Competitive*

relentless increases in the price of oil[2] resulting from the cornering of the oil market by the Organization of Petroleum Exporting Countries ("OPEC").[3] At the 106th Congress, Rep. Benjamin Gilman (R-N.Y.), chairman of the House International Relations Committee, introduced two bills targeting OPEC's pricing practices.[4] The first piece of legislation would have barred countries participating in the OPEC cartel from receiving U.S. economic or military aid.[5] Because few OPEC member states receive significant foreign aid from the United States, that legislation, if enacted, was expected to have little impact.[6] The bill would also have required the Administration to review its policies with respect to international financial institutions funded in part by the United States, such as the World Bank, to ensure that they do not indirectly support OPEC's price-fixing activities.[7]

More interestingly, the second bill introduced by Rep. Gilman would have allowed U.S. citizens to sue foreign energy cartels.[8] In the Senate, a number of proposals to facilitate

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*Problems in the Oil Industry: Part 2: Hearings Before the House Comm. on the Judiciary*, 106th Cong. (2000) (prepared testimony of Chairman Henry J. Hyde) (commenting on the antitrust problems created by OPEC and noting possible counteractive measures); *see also Organization of Petroleum Exporting Countries (OPEC) Oil Prices and Policies and their Effects on the U.S. Economy: Panel Two of a Hearing of the House Int'l Relations Comm.*, 106th Cong. (2000) (demonstrating the concern and frustration of Committee members over OPEC price increases and policies).

2. Oil prices tripled between January 1999 and September 2000, due to several factors. Energy Information Administration, *World Oil Market and Oil Price Chronologies: 1970-2000* (Jan. 2001), *available at* http://www.eia.doe.gov/emeu/cabs/chron.html.

3. *See* Energy Information Administration, *OPEC Fact Sheet* (Sept. 6, 2001) (noting that OPEC member nations produce about 40% of the world's oil and control about 77% of proven reserves), *available at* http://www.eia.doe.gov/emeu/cabs/opec.html.

4. *See* Foreign Trust Busting Act, H.R. 4731, 106th Cong. (2000); International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. (2000); Patrick Crow, *Watching Government: High Gasoline Prices Spark Political Furor*, 98.27 OIL AND GAS J. 26, 28 (2000).

5. *See* International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. (2000); *see also* Carter Dougherty, *Oil Exporters Get Nudge, Sanctions Urged to Fight Rising Gas Prices*, THE WASH. TIMES, Mar. 1, 2000, at B8.

6. *See* Dougherty, *supra* note 5, at B8.

7. H.R. 4732; *see* Crow, *supra* note 4, at 28.

8. Crow, *supra* note 4, at 28.

lawsuits against OPEC were also floated. Sen. Mike DeWine (R-Ohio) introduced legislation that would allow the Department of Justice to sue foreign countries, such as OPEC members, for price-fixing activities.[9] Moreover, describing OPEC as "an old-fashioned conspiracy in restraint of trade,"[10] two senior senators, Arlen Specter (R-Pa.) and Joe Biden (D-Del.), wrote a letter to President Clinton urging him to immediately institute legal action against OPEC.[11]

Sens. Specter and Biden suggested legal action on two fronts. First, the U.S. should file a lawsuit before the International Court of Justice at the Hague, on the grounds that conspiracies and cartels in restraint of trade are a violation of international law.[12] Second, the United States should pursue OPEC in federal court, on the grounds that OPEC's price-fixing behavior violates U.S. antitrust law.[13] Sens. Specter and Biden were quick to recognize that any lawsuit against OPEC, particularly if undertaken by private individuals, would face considerable roadblocks under current legal doctrines and well-established precedents.[14] Legal experts generally share this view and regard lawsuits against OPEC with some degree of skepticism.[15]

Sens. Specter and Biden also favored legislation that would remove legal obstacles and ease the deeply ingrained discomfort of U.S. courts confronting antitrust claims involving foreign sovereigns.[16] Even under current law, however, it is not perfectly clear that a U.S. court would necessarily reject an antitrust claim against OPEC, particularly if sponsored by the Justice Department. After all, it has been over twenty years since the

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9. S. 2778, 106th Cong. (2000); Crow, *supra* note 4, at 28.

10. *Lawsuits vs. OPEC?*, 78 PLATT'S OILGRAM NEWS 6 (2000).

11. Carl Weiser, *Senators Urge U.S. to Sue OPEC over Oil "Conspiracy*," GANNETT NEWS SERV., Mar. 31, 2000, *available at* 2000 WL 4396945.

12. *Id*.

13. *Id*.

14. *See* News Conference with Senator Arlen Specter (R-Pa.) and Senator Joseph Biden (D-Del.), Oil Prices and OPEC*, in* FED. NEWS SERV., Mar. 30, 2000.

15. *See* Weiser, *supra* note 11.

16. *See* News Conference with Senator Arlen Specter (R-Pa.) and Senator Joseph Biden (D-Del.), Oil Prices and OPEC*, in* FED. NEWS SERV., Mar. 30, 2000.

last such lawsuit, filed on behalf of a trade association of transport workers, met a negative response in the Ninth Circuit.[17]

This article is intended as a roadmap for practitioners and policy analysts interested in the legal obstacles that prevent litigants from successfully pursuing antitrust claims against OPEC, effectively sanctioning the cartel's price-fixing activities. OPEC's antitrust conspiracies expressly violate the language of the Sherman Act[18] and related legislation.[19] However, under current legal precedents[20] and absent specific sponsorship by the

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17. *Cf.* Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981) (affirming dismissal under the act of state doctrine in a suit seeking to enjoin OPEC member states' price fixing activities under U.S. antitrust law).

18. According to Section 1 of the Sherman Act,

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

According to Section 2,

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

15 U.S.C.S. §§ 1-2 (2001).

19. *See, e.g.,* The Clayton Act, 15 U.S.C. §§ 12-27 (2000). The Foreign Trade Antitrust Improvements Act (FTAIA) of 1982 amended the Sherman Act to establish a uniform test for determining its extraterritorial reach. *See* 15 U.S.C. §§ 6a, 45(a)(3) (1988). The FTAIA makes the Sherman Act inapplicable to transactions involving foreign commerce (other than import trade or commerce) unless there is a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce, or export commerce involving domestic persons. 15 U.S.C. §§ 1, 6a, 45(a)(3) (2001). On its face, however, the FTAIA does not apply "to the kinds of activity by foreign firms . . . that are most likely to create international tensions; for example . . . export cartels from foreign nations into the United States." Eleanor M. Fox, *Extraterritoriality and Antitrust–Is "Reasonableness" the Answer?*, 1986 FORDHAM CORP. L. INST. 49, 62 (1986).

20. *See e.g.*, Int'l Ass'n of Machinists & Aerospace Workers, 649 F.2d at 1361-62 (affirming dismissal of suit enjoining OPEC members' price fixing activities on the basis

Executive, an antitrust lawsuit against OPEC is unlikely to succeed. This article argues that although the judicial bias against such litigation is clear, there is no fundamental legal reason why it may not ultimately be successfully pursued. It has been the long-standing policy of the U.S. government, clearly articulated by the Clinton administration, not to implicate OPEC member states in antitrust litigation.[21] Should the Executive announce a contrary policy, however, the judicial bias against OPEC-related claims probably would change.

Part I of this article provides a general background of OPEC, including its history, current structure, and its impact on the oil industry and gasoline markets. Part II will discuss the development and evolution of U.S. law with respect to the extra-territorial enforceability of the Sherman Act. Part III will examine the hostility of U.S. courts to lawsuits implicating foreign sovereignties in oil-related antitrust conspiracies.

Part IV will try to account in part for this hostility, by discussing the various common law principles that apply when the acts of a foreign sovereignty are implicated in domestic litigation, as well as the statutory enactment of these principles. Part V will discuss the most recent legal standards, as developed by the Supreme Court and the Circuit Courts, with respect to antitrust conspiracies involving foreign sovereigns. Part V will also attempt to apply these standards to the OPEC oil

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that the act of state doctrine precluded the exercise of federal court jurisdiction where restraint in this area of foreign policy has been shown by the executive and legislative branches).

21. *See Oil Prices and Policies and their Effects on the U.S. Economy: Hearing of the House Int'l Relations Comm.*, 106th Cong. (2000) ("Congressman, I think the way to engage OPEC is through effective diplomacy, and I believe we are doing that. Now, we can't support the chairman's bill of sanctions . . . Congressman, I would say that we would oppose that bill, because we believe in engaging OPEC . . . What we try to do with OPEC is engage them, convince them, make our arguments on economic grounds, not political grounds. It doesn't pay, I have found, to coerce or threaten, but to be forceful. And, as you know, a lot of OPEC countries were not happy when I made those visible trips and when I advocated very strongly for our position. This last time we took a more low-key approach, but it still involved a number of telephone calls and quiet visits that took place. That's how I think we should deal with OPEC. OPEC is a reality. They are going to be around. And as a nation we need to reduce our reliance on imported oil. I think that is message number one," testimony of William B. Richardson, Secretary, U.S. Department of Energy).

conspiracy. The article will conclude by briefly discussing the failure of the case of *International Ass'n of Machinists & Aerospace Workers ("IAM") v. OPEC*,[22] specifically evaluating the prospects of that litigation should it replay itself in U.S. courts under current law.

## II. OPEC—THE CARTEL'S HISTORY, IMPACT, AND PROSPECTS

### *A. The World is Awash with Oil*

There is no shortage of oil.[23] During the last two decades, the costs required to exploit and discover oil reserves have fallen by over 80%.[24] Technological advances, including improved platform designs and drilling methods, allow companies better access to hard-to-tap oil.[25] Computer-assisted three-dimensional imaging allows geologists to "see" underground oil pockets, slashing the costs of developing oil reserves, as well as improving the chances of discovering virgin oilfields.[26]

Oil production is now profitable even at slim $7-$8 per barrel margins.[27] As a consequence, the world's proven oil reserves (i.e., oil profitably recoverable at current prices under current conditions) stand at over one trillion barrels.[28] According to the International Energy Agency (IEA) in Paris, those reserves may actually exceed 2.3 trillion barrels.[29] Even if the world maintains its currently high consumption rate of 73 million barrels a day, there is enough oil available today to last for over 70 years.[30]

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22. *Int'l Ass'n of Machinists & Aerospace Workers*, 649 F.2d at 1354.

23. *See* Amy Myers Jaffe and Robert A. Manning, *The Shocks of a World of Cheap Oil*, FOREIGN AFF., Jan.—Feb. 2000, at 16 (indicating world petroleum reserves of more than a trillion barrels of provable reserves and ultimately recoverable reserves of potentially four trillion barrels).

24. Sean Kilcarr, *The Fuel Conundrum*, FLEET OWNER, May 2000, *available at* 2000 WL 10254747.

25. Jaffe and Manning, *supra* note 23, at 16.

26. *Id*.

27. Kilcarr, *supra* note 24, *available at* 2000 WL 10254747.

28. Jaffe and Manning, *supra* note 23, at 16.

29. *Id*.

30. Kilcarr, *supra* note 24, *available at* 2000 WL 10254747.

Estimates vary, but between two and six trillion tons of oil remain in the ground.[31] At the present rate of use, it may take two centuries before the world runs out of oil.[32] Of course, by that time, new technologies could be available that render oil-based energy obsolete.[33] The impact of technological trends on oil consumption patterns can be remarkable. As a result of improved efficiency of use, the amount of oil needed to generate a dollar of economic production in the U.S. has been slashed by about 50% during the past 25 years.[34]

Unfortunately, the price of oil is driven by politics, not geology.

### *B. A Primer on OPEC—Some Basic Facts*

Until 1950, the United States, Britain, and the Netherlands effectively controlled the production and distribution of world oil through their influence over the "Seven Sisters," as Exxon, British Petroleum (BP), Royal Dutch-Shell, Gulf, Texaco, Standard Oil of California, and Mobil came to be known.[35] In those days, four out of these seven vertically integrated multinational corporations (Exxon, BP, Shell and Gulf) accounted for over 83% of the world's production of crude oil.[36]

Before the emergence in the 1970s of the "independents," or smaller American oil companies (e.g., Hunt Oil, Getty Oil), the Seven Sisters were the only buyers of the global supply of crude oil.[37] Confronted by this monopsony,[38] five oil-producing countries (Venezuela, Saudi Arabia, Kuwait, Iraq and Iran) agreed in 1960 to form OPEC, in order to increase their

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31. Shirdell McDonald, *Petroleum Is Plentiful, a Bargain – Oil: Lots of Factors Play a Role in the Availability and the Rise and Fall of Prices for Gasoline and Home Heating Fuel*, BALT. SUN, Oct. 4, 2000, at 2A.

32. *Id*.

33. *See id.*

34. *Id*.

35. ALI D. JOHANY, THE MYTH OF THE OPEC CARTEL: THE ROLE OF SAUDI ARABIA 7 (University of Petroleum & Minerals and John Wiley & Sons 1980).

36. *Id*.

37. *Id*. at 8 (noting also the impact of the entry of state-owned European and Japanese companies into the world oil market).

38. *Id*.

bargaining leverage, thereby asserting firmer control over the exploitation of their oil reserves.[39]

As OPEC matured, it progressively tightened control over its membership's market positions.[40] On the advice of Venezuelan experts, by 1950 oil producers in the Persian Gulf region had changed their contracts with the foreign multinationals to require an equal split in profits.[41] By 1964, OPEC began requiring generous per barrel royalty payments instead.[42] On October 16, 1973, however, OPEC for the first time substituted negotiation for legislation, and resolved to fix the price of oil unilaterally.[43] Accordingly, the posted price for oil was raised from $3.011 to $5.119, an increase of almost 70%.[44]

The political environment at the time facilitated the consensus necessary to cement such a steep price hike. As a result of the third Arab-Israeli War, newspaper editorials and public opinion in the Arab world forcefully clamored for retaliation against the United States for its "war-like behavior" towards Arabs and its pro-Israel policies.[45] Accordingly, the OPEC membership met in Riyadh, and declared an embargo on oil exports to the United States and the Netherlands.[46] The oil embargo of 1973 not only inconvenienced consumers with increased gas prices and long lines at the pump, it also set off a series of financial dislocations—including runaway inflation and crippling interest rates—that damaged the global economy, causing widespread recession.[47]

Politics often serve to cement consensus among the OPEC membership, but can also have a destabilizing effect. For

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39. COBY VAN DER LINDE, THE STATE AND THE INTERNATIONAL OIL MARKET: COMPETITION AND THE CHANGING OWNERSHIP OF CRUDE OIL ASSETS 25 (Kluwer Academic Publishers 2000).

40. *See id*. (stating that OPEC members, during the late 1960s and early 1970s, achieved greater market share and secured more money for their domestic economies).

41. Johany, *supra* note 35, at 4-5.

42. *Id*. at 6.

43. *Id*. at 14.

44. *Id*.

45. *Id*.

46. *Id*.

47. John Spears, *No Panic Yet Over High Oil Prices*, TORONTO STAR, Sept. 9, 2000, at D1.

example, although the outbreak of the Iran-Iraq war resulted in historically high oil prices,[48] the late stages of that conflict and its aftermath provoked a contrary effect.[49] Although Iran sought to halt the 1986 slump in the price of oil by reintroducing oil production quotas, Iraq begrudgingly accepted any quota at all, and flatly refused to comply with any quota lower than Iran's.[50] Between 1986 and 1990, Iraq continued to favor a pricing strategy that downplayed national self-interest and was explicitly designed to injure the economic interests of its old antagonist.[51]

Another source of cartel instability results from the lack of homogeneity within the OPEC membership, which erodes its ability to reach internal agreement on policies.[52] For example, countries like Kuwait, the United Arab Emirates, and Saudi Arabia have plentiful oil reserves that can be tapped cheaply.[53] Consequently, the stabilization of oil prices at high levels entails relatively more significant production restrictions and foregone profits for these countries.[54]

Although the members of OPEC have often failed to achieve consensus, when they agree on a policy—and ignore the obvious temptation to cheat[55]—national governments generally can effectively implement it.[56] For the most part, OPEC countries tightly regulate the exploitation of domestic oil.[57] In fact, to

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48. *See* Steve Lohr, *Spot Oil Price Up On War Items*, N.Y. TIMES, Sept. 24, 1980, at D1.

49. *See* Steve Lohr, *OPEC Pact Blocked by Iraq Snag,* N.Y. TIMES, Dec. 17, 1986, at D1 (discussing reasons why the conflict's late stages and surrounding circumstances lowered oil prices).

50. *Id.*

51. van der Linde, *supra* note 39, at 76.

52. *Id.* at 140.

53. *See id*. at 74-75 (describing the competing interests of high spare production capacity nations like Saudi Arabia, Kuwait and the United Arab Emirates, which oppose restrictions that diminish large economies of scale, as opposed to low spare production capacity nations, which prefer restrictions that keep prices high).

54. *See id*. at 72 (explaining why interests in high and stable prices may conflict with interests in increasing production).

55. *See id*. at 63 (explaining the political pressures that lead to cheating).

56. *See id*. at 65 (discussing a recent production cut effectively implemented by OPEC members).

57. *See id*. at 25, 34-35.

varying degrees, Arab states have sought to nationalize their oil businesses not only as a political weapon, but to further centralize control over domestic oil.[58] Libya was a trailblazer in this regard, and set up a model of national government control over oil resources that other OPEC members have sought to emulate.[59] Although OPEC governments implicate themselves in almost every facet of the oil business, they are not wholly intermeshed with the entities that exploit domestic oil resources, which remain distinct corporations.[60]

For example, despite a recent rash of colossal mergers among Western oil companies,[61] Saudi Arabia's national oil corporation, Saudi Aramco, remains by far the largest vertically integrated producer of oil in the world.[62] Although Saudi Aramco's anchor asset is its control over liquid reserves estimated at 259 billion bbl, or 25% of the world's total,[63] the company is broadly diversified, and has made major investments in refineries and distribution networks in the United States, the Far East, and Europe.[64] In fact, for over two decades the state oil companies of Saudi Arabia, Venezuela, Iran, Indonesia, Mexico, and Kuwait have dominated the top ten spots in the authoritative Petroleum Intelligence Weekly ranking of the world's major energy companies.[65]

Currently, OPEC dominates approximately 76% of the

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58. *See* Johany, *supra* note 35, at 14 (detailing political motivations for nationalization).

59. *See id.* at 9-10.

60. *See* van der Linde, *supra* note 39, at 12-14 (detailing the arrangements between governments and oil companies).

61. Recent mergers include that of Amoco Corp. and Atlantic Richfield (ARCO) with British Petroleum Co. PLC (BP) (deal valued at $200 billion); Mobil Corp. with Exxon Corp. (deal valued at $270 billion); and Petrofina SA with Elf Aquitaine SA to Total SA. Smaller mergers have also occurred between regional subsidiaries of Shell Oil Co. and Texaco Inc., and Ashland Oil Co. and Marathon Oil Co. John B. McArthur et al., *Balance Needed in Operating Agreements as Industry's Center of Gravity Shifts to State Oil Firms*, 98.43 OIL & GAS J. 74 (2000); van der Linde, *supra* note 39, at 147-49.

62. *See* McArthur et al., *supra* note 61, at 75-76.

63. *Id*.

64. Saudi Aramco, *International Operations, available at* http://www.saudiaramco.com/frm_operation.html (last visited Sept. 21, 2001).

65. van der Linde, *supra* note 39, at 129-30 n.302.

world's known oil reserves.[66] However, it has the capacity to pump only about 42% of the global demand for oil,[67] limiting its ability to raise prices, as well as diluting any profit resulting from price increases.[68]

## III. U.S. LAW—THE DEVELOPMENT OF SOME BASIC CONCEPTS

### *A. The Extraterritorial Reach of U.S. Antitrust Law—The Tensions Between the Effects Doctrine and the Territoriality Principle*

Domestic antitrust law could conceivably find jurisdiction against a foreign cartel on the basis of either the effects doctrine or the territoriality principle.[69] Under the effects doctrine, the court would focus the jurisdictional inquiry on whether a given conduct has anticompetitive effects within the U.S.[70] If anticompetitive effects are found, then the court will extend jurisdiction, regardless of where the conspiracy was organized or advanced, or of the nationality of the persons involved.[71]

By contrast, the territoriality principle focuses the jurisdictional inquiry on the situs of the conspiracy and the citizenship of its perpetrators.[72] Accordingly, conduct perpetrated abroad by foreign nationals would be free from liability, even when the anticompetitive effects in the United States are severe.[73]

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66. *Id.* at 79.

67. *Id.* at 151.

68. *See id*. (arguing that because OPEC controls only 42% of oil produced, any OPEC price increase will not affect the market because users can find other, less expensive sources).

69. Ulrich Immenga, *Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy*, *in* ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 93, 96 (John O. Haley & Hiroshi Iyori ed., Pacific Rim Law & Policy Association 1995).

70. *Id.* at 107.

71. *Id*.

72. *See* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS., 1, 8 (1992).

73. *See id.*

### *1. The Schooner Exchange v. McFaddon—The Birth of the Territoriality Principle under U.S. Law*

As discussed below, the territoriality principle no longer measures the reach of U.S. antitrust law.[74] However, the territoriality principle has been a formative element in the development of the act of state doctrine,[75] which in turn has deep repercussions with respect to any potential lawsuit (antitrust or otherwise) targeting OPEC.[76] The origin of the territoriality principle, as well as its subsequent development, therefore warrants a brief review.

Shortly after the Revolutionary War, the army of Napoleon, emperor of France and king of Italy, commandeered an American ship.[77] The ship, now flying the French colors, docked in the port of Philadelphia, where its former owners filed a libel suit to reclaim the ship.[78] In 1812, *The Schooner Exchange v. McFaddon* reached the Supreme Court, which declined to return possession of the ship to the original owners.[79]

Chief Justice Marshall, writing for the majority, reasoned that a French warship was immune from the *in rem* jurisdiction of a U.S. court.[80] However, he noted that this result was discretionary, and resolved the matter not as an issue of any overriding principle of universal law, but of sound policy.[81]

In fact, because the ship was in their waters, U.S. courts had an authority over the ship that was both inescapable and absolute.[82] To emphasize this point, the Chief Justice explored

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74. *See id.* at 61-65.

75. *See* Russ Schlossbach, Note, *Arguably Commercial, Ergo Adjudicable?: The Validity of a Commercial Activity Exception to the Act of State Doctrine*, 18 B.U. INT'L L.J. 139, 141-44 (2000) (discussing the rationale behind the act of state doctrine).

76. *See Int'l Ass'n of Machinists and Aerospace Workers*, 649 F.2d. at 1354.

77. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 117 (1812).

78. *Id*. at 118.

79. *Id*. at 147.

80. *Id*. (holding that a foreign ship from a country at peace with the United States visited American ports under an implied promise that it was exempt from jurisdiction).

81. *See id*. at 136-39 (detailing the policy on which the Schooner decision was based).

82. *Id*. at 136 (discussing how the jurisdiction of a nation within its own territory is absolute).

the fundamental origin of the jurisdiction of the courts of any sovereign government, and thereby articulated the territoriality principle for the first time in U.S. law:[83]

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a dimination [sic] of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[84]

In other words, once territoriality has been established, a court may decline to exercise jurisdiction only as a conscious act, and immunity is therefore never an automatic, preordained result.[85] Instead, it is a deliberate result sought by a sovereign court, in order to achieve a higher objective, distinct from that which a simple exercise of jurisdiction would have achieved.[86] Friendly governments owe each other good faith and respect, and these qualities are best promoted through mutual restraint.[87] Therein lay an excellent reason, according to the Chief Justice, for the court to decline jurisdiction as a matter of policy.[88] After all, the practice among civilized nations had theretofore been "that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[89]

According to the Chief Justice, the immunity resulting from

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83. The Chief Justice, noting the state of the law at the time he was called upon to resolve the matter, wrote: "In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this." *Id*.

84. *Id*.

85. *See id*.

86. *See id*. at 136-37.

87. *See id*. at 137 (asserting that a nation which exercised its territorial powers over a foreign sovereign would be violating good faith).

88. *See id*. (noting that a sovereign would not willingly place himself under the jurisdiction of another nation state without the implied promise of jurisdictional immunity).

89. *Id*. at 145-46.

judicial restraint among sovereigns is not an exception to the principle of territoriality.[90] In fact, it is its natural consequence.[91] Reflecting on what later on came to be known as the act of state doctrine, the Chief Justice thus explained:

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.[92]

*a. The OPEC Oil Conspiracy & Territoriality—Legal Impact of a Venerable, if Time-Worn, Doctrine*

It would not bode well for litigation against OPEC if the territoriality principle were applied. The oil ministers of the OPEC member states have always met abroad.[93] In 1960, the representatives of Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela assembled themselves as the first OPEC conference, held in Baghdad.[94] Between 1961 and 1973, eight other countries would join OPEC,[95] which moved its institutional headquarters from Geneva to its current property in Vienna in 1965.[96] The OPEC Conference of Ministers meets at least twice a year in regular session.[97] Including extraordinary sessions, over 100 such meetings have been held in various cities around the world

90. *See id*. at 146.

91. *See id*. (discussing the general inability of the judicial power of one nation to enforce its decisions over another sovereign nation, and arguing such disputes should be left to diplomatic, rather than legal, resolution).

92. *Id*. at 136.

93. *See* http://www.opec.org/About_OPEC/beyond1990history.htm (last visited Sept. 10, 2001).

94. Johany, *supra* note 35, at 6.

95. *Id*.

96. http://www.opec.org/FAQs/AnswersAboutOPEC.htm (last visited Sept. 11, 2001).

97. *Id*.

(mainly Vienna and Geneva), but never in the United States.[98]

During OPEC conferences, a consensus policy is developed, setting specific barrel per day production levels for each member state, to be followed at its own government's discretion.[99] The decision to implement the production cuts requested by OPEC is determined at the highest ministerial levels within each member state,[100] and the acts necessary to actually cut production occur in the course of exploiting domestic oil fields.[101] OPEC's conspiracy thus consists of three distinct phases: a meeting, where oil production rates are fixed; a ministerial decision to implement agreed upon production rates; and the actual setting of those production rates in the ordinary course of managing and operating the oil fields.[102] All of these activities take place abroad.

For at least two centuries, the territoriality principle has colored judicial attitudes towards foreign sovereigns. However, although the territoriality principle remains the "grandfather" of many venerable doctrines, such as the principle of comity and the act of state doctrine, its legal influence has been progressively eroding.[103] With increased globalization, whether the territoriality principle continues to make any sense at all remains an open question.

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98. *See* http://www.opec.org/About_OPEC/beyond1990history.htm (last visited Sept. 10, 2001).

99. *See* http://www.opec.org/FAQs/AnswersAboutOPEC.htm (last visited Sept. 11, 2001).

100. *See e.g., Kuwait–OPEC Middle East Decision-Makers*, APS REVIEW DOWNSTREAM TRENDS, Dec. 4, 2000, *available at* 2000 WL 10436213 (discussing decision-making within Kuwait with respect to the oil sector); *Saudi Arabia – OPEC Middle East Decision-Makers*, APS REVIEW GAS MARKET TRENDS, Dec. 4, 2000, *available at* 2000 WL 10435729 (discussing decision-making within Saudi Arabia with respect to the oil sector); *Iraq – OPEC Middle East Decision-Makers*, APS REVIEW DOWNSTREAM TRENDS, Dec. 4, 2000, *available at* 2000 WL 10436212 (discussing decision-making within Iraq with respect to the oil sector).

101. *See* http://www.opec.org/FAQs/AnswersAboutOPEC.htm (last visited Sept. 11, 2001) (explaining how OPEC meetings function and that each OPEC member country controls its own oil output).

102. *See id*.

103. Born, *supra* note 72, at 71-72.

### 2. *American Banana Co. v. United Fruit Co.—A View of the Sherman Act Faithful to the Principle of Territoriality*

In *American Banana Co. v. United Fruit Co.* (1909), the Supreme Court spoke for the first time on the extraterritorial application of U.S. antitrust law, articulating a rigorous principle of territoriality that focused exclusively on the situs of the disputed conduct, disregarding even questions of citizenship.[104] The plaintiff was an American company that alleged serious anticompetitive behavior in Central America by the United Fruit Company, a New Jersey corporation exporting fruit to the United States.[105] The defendant had threatened to drive the plaintiff off the market unless it voluntarily combined, which the plaintiff refused to do.[106] The defendant retaliated by influencing local officials to deploy armed men to drive the plaintiff off its premises in Panama, thereby securing a local monopoly in the production of bananas grown for export to the United States.[107] Soldiers seized part of the plaintiff's plantation, a cargo of supplies, interrupted construction of a railway serving the plantation, and effectively shut it down.[108]

Justice Holmes, whose views on the recently enacted Sherman Act were notoriously narrow,[109] summarily dismissed the plaintiff's suit, stating: "We think it is entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."[110]

In other words, the Court was not exercising its discretion to decline jurisdiction. Quite simply, it instead lacked so-called "prescriptive" jurisdiction, because Congress had not intended

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104. 213 U.S. 347, 357-59 (1909).

105. *See id*. at 354-55.

106. *See id*. (contending that the defendant had interfered with the plaintiff's building a railway through the use of the defendant's contacts in Panama and Costa Rica).

107. *Id*.

108. *Id*.

109. *See* Hunt v. Mobil Oil Corp., 550 F.2d 68, 74 n.6 (1977).

110. *Am. Banana Co.*, 213 U.S. at 357.

that the Sherman Act cover conduct committed abroad.[111] Therefore, the Court lacked statutory authority to address or remedy the plaintiff's grievances.[112]

The Supreme Court has never formally overruled *American Banana*, but has in numerous occasions explicitly distanced itself from its reasoning.[113] *American Banana* has been described as an "artifact and museum piece of no precedential value" in litigation before the Second Circuit Court of Appeals. [114] According to that court, the decision has indeed been overruled, at least insofar as its narrow reading of the jurisdictional reach of the Sherman Act is concerned.[115] In *Continental Ore v. Union Carbide & Carbon Corp*., the Supreme Court itself came close to explicitly overruling *American Banana*, flatly stating, "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."[116]

However, eighty-four years after *American Banana*, Justice Scalia would attempt to revive Justice Holmes's prescriptive jurisdiction argument in his vigorous dissent in *Hartford Fire Insurance Co. v. California*.[117] According to Justice Scalia, a fundamental canon of statutory construction is that "an act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction remains."[118] Therefore,

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111. *See id.* (holding that the defendant's monopolistic use of assets in Panama, Colombia, and Costa Rica did not fall within the scope of the Sherman Act).

112. *See id.* (holding that the seized plantation was within the de facto jurisdiction of Costa Rica and its seizure by that state was an act of a sovereign power that could not be adjudicated in the American court system due to lack of jurisdiction).

113. For commentary on the erosion of the *American Banana* view of jurisdiction, *see* Wilber L. Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925, 926-935 (1963).

114. *Hunt*, 550 F.2d at 73.

115. *Id*. at 74 n.6.

116. Cont'l Ore Co. v. Union Carbide Corp., 370 U.S. 690, 704 (1962).

117. *See* 509 U.S. 764, 817 (1993) (arguing that the district court should not have exercised Sherman Act jurisdiction over foreign reinsurers under principles of "prescriptive" comity).

118. *Id* at 814-15. (*citing* Murray v. Schooner Charming Betsy, 6 U.S. 64, 2 Cranch 64 (1804)).

a federal court has no jurisdiction over an alleged Sherman Act violation arising from anticompetitive conduct committed abroad that does not violate local ordinances.[119] Whether or not *American Banana* is good law, its influence continues to be felt.

### *3. United States v. Sisal Sales Corp.—The "Liberal" Approach to an Inherently Restrictive Theory*

In *United States v. Sisal Sales Corp*., the Supreme Court again confronted an antitrust conspiracy implicating the acts of a foreign government, where all of these acts had been perpetrated abroad.[120] However, when this case was decided in 1927, the influence of *American Banana* had already begun to wane. The controversy at issue in *Sisal Sales* involved a conspiracy to control the importation of sisal, a fiber of the henequen plant in Mexico commonly used as binder twine for grain crops.[121] The defendants had accumulated large stocks of sisal in both the United States and Mexico, as well as extensive land holdings in Yucatan, where henequen is grown.[122] The defendants then allegedly induced the governments of Mexico and Yucatan to pass discriminatory legislation in their favor, including for financing.[123] The Comisión Exportadora de Yucatán, a government agency, was created and became the sole purchaser of sisal from producers in Mexico.[124] Through a series of contracts, defendants then arranged to become the sole agent and distributor of sisal in the United States for that government agency.[125]

The Court highlighted the role of the three U.S. banking corporations that bankrolled the conspiracy and brought it to

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119. *See Am. Banana Co.*, 213 U.S. at 357 (holding that because acts of defendant were committed outside of the United States and did not violate foreign local laws, they were outside the reach of federal jurisdiction). It is worth remarking that Justice Scalia was counsel to OPEC when the cartel was the object of an unsuccessful antitrust lawsuit before the Ninth Circuit Court of Appeals, discussed below. *Int'l Ass'n of Machinists and Aerospace Workers*, 649 F.2d at 1354.

120. 274 U.S. 268 (1927).

121. *Id*. at 272.

122. *See id*. at 273.

123. *Id*.

124. *Id*.

125. *See id*.

fruition by entering into a series of contracts.[126] Crucially, U.S. persons had committed acts critical to the success of the conspiracy in the United States.[127] Despite the active participation of the Mexican government, this was not a homegrown Mexican conspiracy.[128] The mere fact that a conspiracy involves activities conducted abroad does not foil the Sherman Act.[129] Moreover, the participation of a foreign government in an antitrust conspiracy does not immunize from liability the U.S. nationals that promoted the conspiracy.[130]

Although at first blush it may seem that *Sisal Sales* is a first step away from *American Banana*, the analysis that the Court applied in *Sisal Sales* remains faithful to the territoriality principle.[131] Nonetheless, *Sisal Sales* is distinct from *American Banana* in at least two ways. First, it construes the situs of a conspiracy more widely to include the places where activities collateral to the main conspiracy are undertaken. Second, it introduces issues of citizenship into the jurisdictional analysis under the territoriality principle.

*Sisal Sales* remains a far cry from the "effects" doctrine as developed in *Alcoa*, discussed below. Under the legal analysis applied in *Sisal Sales*, an antitrust claim arising from a conspiracy that implicates a foreign government is ineffectual unless the participation of a U.S. national can also be identified.[132] Moreover, the U.S. national—and not the foreign government—bears all the liability.[133]

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126. 274 U.S. 268, at 271-73.

127. *See id*. at 272.

128. *Id*.

129. *See Cont'l Ore Co.*, 370 U.S. at 704 (holding that a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries).

130. *See id*. at 705 (holding that defendants are not shielded from liability under the Sherman Act merely because their activities are aided by a foreign government).

131. *See id*. at 705 n.13 (holding that an article of commerce produced abroad may violate the Sherman Act if the results of that production have effects within American boundaries).

132. *See id*.

133. *See id*.

In fact, *Sisal Sales* has colored the reaction by policymakers to increases in the price of oil induced by production cuts within OPEC countries. Traditionally, U.S. oil companies have been subject to public ire and heightened scrutiny, even abuse, when they "profiteer" from oil price increases resulting from production cuts within OPEC.[134] Because OPEC controls only 42% of the world's oil production,[135] OPEC production cuts are a financial bonanza for the Western oil companies that produce the bulk of the world's supply of oil.[136] Moreover, unlike the OPEC membership, these oil companies do not sacrifice profits by cutting back production to secure OPEC's target price.[137] They are veritable free riders. For example, during the run-up in oil prices throughout the year 2000, the earnings of most oil companies more than doubled, with the ten largest non-OPEC oil companies piling up over US $40 billion in profits.[138] According to a spokesman for ExxonMobil, "We've got a lot of cash around here . . . . It's coming in pretty fast, flying through the door."[139]

In the aftermath of the oil embargo of 1973, industry representatives were hauled before Congress and grilled over alleged price-fixing activities.[140] The four major oil companies operating in Saudi Arabia also faced an exhaustive, six-year investigation by the Antitrust Division of the Justice Department.[141] The Federal Trade Commission sued to split up the major oil companies, on the grounds that they had engaged

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134. *See* Timothy W. Maier, *Oil Debate Boils*, INSIGHT MAG., Oct. 23, 2000, at 10; *see also* Neal H. Cruz, *Don't Knock the OilEx Before You've Tried It*, PHILIPPINE DAILY INQUIRER, Sept. 27, 2000, at 8 (stating that general public opinion is that oil companies are profiteers, opportunists, cheats and liars).

135. van der Linde, *supra* note 39, at 151.

136. *See id*.

137. *See* Peter Behr, *Earnings Double at Big 3 Oil Firms,* WASHINGTON POST, Oct. 25, 2000, at E01 (inferring that American oil companies receive higher profits when OPEC limits production).

138. *See id*.

139. *Id*.

140. Richard A. Oppel, Jr., *Circumventing An Oil Crisis; This Time, Policy Makers Take a Hands-Off Approach*, N.Y. TIMES, Oct. 4, 2000, at C1.

141. *Id.*

in collusion.[142] During the most recent run-up in oil prices, former Vice President Al Gore requested a criminal investigation of the industry for collusion, antitrust violations, and price-gouging.[143] Perhaps, however, it is a distraction to blame the domestic oil industry when OPEC flexes its muscles.

*4. United States v. Alcoa—The Birth of the "Effects" Doctrine*

According to the effects doctrine, a state may apply its domestic antitrust law to conduct committed abroad if that conduct has anticompetitive effects within its territory.[144] The effects doctrine was incorporated into U.S. law by Judge Learned Hand's seminal decision in *United States v. Aluminum Co. of America (Alcoa)*.[145]

That case involved an ongoing conspiracy to preserve a long-standing monopoly in the aluminum market through excess capacity and other forms of entry deterrence.[146] In particular, Alcoa was alleged to have entered, through a sister corporation incorporated in Canada, into a conspiracy to divide markets with European producers.[147] The conspiracy involved an agreement that did not mention the U.S. market, and which Alcoa had not signed.[148] However, it had a direct effect in the United States because it allowed Alcoa to price freely, without

142. *Id.*

143. Maier, *supra* note 134, at 10.

144. Immenga, *supra* note 69, at 107.

145. 148 F.2d 416, 443-44 (2nd Cir. 1945). This decision carries the weight of Supreme Court precedent. The case was relegated to the Second Circuit Court of Appeals only when the Supreme Court failed to reach the necessary quorum, because so many of the Justices had recused themselves. Renee Hardt, *Kodak v. Fuji: A Test Case for the Extraterritorial Application of the Sherman Act*, 15 B.U. INT'L L.J. 309, 316 n.35 (1997).

146. *See Alcoa*, 148 F.2d at 443-44 (explaining that the 1936 agreement implemented a system of royalties to penalize production over quotas while blocking Germany from the "cartel" for the future because of its ability to dispose of all of its production).

147. *See id.* at 440 (noting that plaintiffs presented evidence that Alcoa contributed to the creation of the 'Alliance,' which was arranged in 1931 in Canada, and that Alcoa "had already had an understanding with foreigners as to prices").

148. *See id.* at 442-43 (referring to the "agreement entered into on July 3, 1931, the signatories to which were a French corporation, two German, one Swiss, a British, and 'Limited'").

inviting a flood of cheap imports.[149]

Judge Hand resolved the case on the basis of an intent/effects test, under which the Sherman Act reaches extraterritorial conduct where the disputed conduct is intended to affect the U.S. market, and does in fact have such an effect.[150] Accordingly, defendants were held liable, the court finding that (1) the quota agreement was intended to affect U.S. imports, and that (2) it was likely to affect them.[151]

*Alcoa* is a crucial decision because it wholly abandons the territoriality principle.[152] The conspiracy allegedly had been perpetrated abroad, which under *American Banana* would have been enough to guarantee immunity.[153] Moreover, the participants in the conspiracy were all foreign corporations, which under *Sisal Sales* would have been enough to foil liability.[154]

In sum, Judge Hand redefined the jurisdictional inquiry that must be pursued by a federal court confronted with a foreign-based antitrust conspiracy.[155] If the conspiracy has as its objective an anticompetitive effect in the U.S. market, and that objective is fulfilled, it is no defense to illegality that the conspiracy was perpetrated abroad.[156] "Both agreements would clearly have been unlawful, had they been made within the United States; and it follows . . . that both were unlawful, though made abroad, if they were intended to affect imports and did affect them."[157]

It may well be improper to attribute to Congress an intent "to punish all whom [federal courts] can catch."[158] However, "it is settled law . . . that any state may impose liabilities, even upon

149. *See id*. at 443.

150. *Id.* at 444.

151. *Id.* at 444-45.

152. *See id*. at 443 (holding that it is settled law that any state may impose liabilities for conduct outside its borders that has consequences within its borders).

153. *See id*.

154. *See id*. at 443-44.

155. *See id*.

156. *See id.* at 444.

157. *Id.*

158. *Id*. at 443.

persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[159] In other words, as the Supreme Court would reaffirm forty years later in *Matsushita Electric Industry Co. v. Zenith Radio Corp*., "[t]he Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce."[160]

*a. Continental Ore Co. v. Union Carbide—What About State-Sponsored Natural Resource Cartels?*

Post-*Alcoa*, it would seem at first blush that OPEC, a natural resources cartel that restricts U.S. imports, should be subject to U.S. antitrust review.[161] This result also follows from the Supreme Court's 1962 decision in *Continental Ore Co. v. Union Carbide & Carbon Corp*., which reaffirmed *Alcoa*.[162] Under *Continental Ore*, antitrust liability may attach even when a foreign sovereign facilitates the conspiracy by enacting discriminatory legislation.[163]

In *Continental Ore*, the defendant had allegedly cornered all U.S.-accessible supplies of vanadium, an ore used as an alloy to harden steel.[164] The alleged conspiracy involved anticompetitive activity both in the United States and Canada, resulting in plaintiff's elimination as a competing purchaser of vanadium in both markets, and as a competing manufacturer of ferrovanadium (for which vanadium is a necessary input).[165] It also involved the participation of a Canadian government agency, not named in the suit, which allocated vanadium

159. *Id.*

160. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 582 n. 6 (1986).

161. *See Cont'l Ore Co.*, 370 U.S. at 704 (holding that "A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.").

162. *Id*. at 704-05.

163. *Id.* at 706-07.

164. *Id.* at 693.

165. *Id.* at 693-94.

supplies among competing purchasers in an allegedly discriminatory manner.[166]

The Court required that the conspiracy be evaluated as a whole, and refused to treat the events in Canada as analytically distinct from those occurring within the United States.[167] Moreover, citing *Sisal Sales*, the Court wholly disregarded the participation of the Canadian government.[168] Liability should not be avoided "by the fact that [the] conspiracy involved some acts by the agent of a foreign government."[169] In other words, it would have been improper to invoke a sovereignty-related doctrine to draw an immunity curtain around anticompetitive activities conducted not only in Canada, but in the United States as well.[170]

Subsequent case law has also tended to expand the effects doctrine.[171] For example, according to *United States v. Nippon Paper Industries*, price fixing activities can form the basis of a domestic antitrust claim when they were wholly perpetrated abroad, but were intended to have, and did in fact have, substantial effects in this country.[172]

*b. The Effects Doctrine, OPEC, and Prices at the Pump*

Clearly, OPEC's cornering of the global oil market has had profound repercussions within oil consuming countries, including the United States, satisfying even the most restrictive reading of the effects doctrine.[173] Despite a world awash in cheap and plentiful oil, oil prices recently hit historical highs. In April

166. *Id.* at 703.

167. *Id.* at 698-99.

168. *Id.* at 705-06.

169. *Id.* at 706.

170. *See id*.

171. *See* United States v. Nippon Paper Indus. Co., 109 F.3d 1,4 (1st Cir. 1997) (adopting the effects doctrine as controlling law for foreign conduct which substantially affects the United States).

172. *Id*.

173. *See e.g.,* Stephen Martin, *Increasing Diesel Costs Stall Trucks; Some Trucking Company Officials Expect the 50 Percent Increase in the Price of Fuel to Slash First-Quarter Earnings*, GREENSBORO NEWS & RECORD, Feb. 27, 2000, at A1 (discussing the repercussions of the increased cost of diesel fuel on the trucking industry following OPEC's call for reduced crude oil production).

1999, in the face of growing demand, OPEC cut back production 7.5%,[174] or about 4 million barrels a day.[175] The cut had its intended effect—per barrel, the price of oil shot up from $10 in 1999 to $37 in September 2000, a 10-year-high.[176] During the 18-month period ending October 2000, gasoline and diesel prices hiked up over 50% throughout the United States.[177]

Truckers and other transport workers, crimped by slim profit margins and firm commitments with customers, have been particularly hurt, and have been at the forefront of fuel protests.[178] In the United Kingdom angry truckers and farmers blocked major oil refineries, causing disrupted deliveries and mass panic buying that fully depleted the supplies of 90% of the gas stations in Britain.[179] A popular daily's headline ran, "Petrol Queues, Pumps Run Dry —– Welcome to the 1970s."[180] In Spain thousands of fisherman and farmers throughout Spain "shut down ports, surrounded wholesale fish markets, and blockaded fuel distribution centers."[181] In Kiel, a city in northern Germany, some 300 taxis brought traffic to a near standstill.[182]

Fuel protests have been more intense in Europe, but they are a worldwide phenomenon. In the United States 200 independent truckers converged in Washington D.C. to request relief from inflated diesel prices that are "killing [their] livelihoods."[183] In Argentina, a trade union of transport groups

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174. *Id*.

175. Kilcarr, *supra* note 24, *available at* 2000 WL 10254747.

176. *See* McDonald, *supra* note 31, at 2A; *OPEC Expected to Hike Oil Quota Amid Price Protests*, DEUTSCHE PRESSE-AGENTUR, Sept. 10, 2000.

177. Peter Sessions, *Caught Napping; Blame Clinton-Gore for our Energy Crisis*, WASH. TIMES, Oct. 19, 2000, at A17; Martin, *supra* note 173, at A1.

178. Yasmin Anwar, *Trucks Carry Message to D.C.: We Need Help as Cost of Diesel Continues to Climb, Drivers Seek Relief*, USA TODAY, Feb. 23, 2000, at 3A.

179. *Standstill Britain: Tony Blair is Standing Firm over the Fuel-Price Protests, but the Chaos the Protesters Have Caused May Still Change His Policies in the Long Run*, ECONOMIST, Sept. 16, 2000.

180. Austin Williams, *A Crude Argument*, THE DAILY TELEGRAPH, Sept. 23, 2000, at 3.

181. *EU Ministers Meet to try to Stop Fuel Price Protests,* FLORIDA TIMES-UNION, Sept. 21, 2000, at A12.

182. *Id.*

183. Anwar, *supra* note 178, at 3A.

recently called a general strike designed to induce the government of Argentina to negotiate with independent refiners for lower gasoline and diesel prices.[184]

The economic impact of the artificial drive-up in the price of oil cannot be underestimated. Oil prices of over $30 a barrel, if sustained, can hamper global growth, add to inflationary pressures, and adversely affect prospects for many consuming countries — particularly poor, developing countries.[185] The negative economic impact to consumers worldwide of OPEC's decision on March 1999 to cut production is projected at almost half a trillion dollars over a one-year period.[186] In inflation-adjusted dollars, the oil embargo of 1973 cost a comparable amount.[187]

In some regions of the world, run-ups in fuel prices foment not only economic disruption, but also political instability. In Ecuador, a short-lived government decree that raised the price of subsidized fuel by 13% triggered strikes and protests that paralyzed the country.[188] Amidst widespread fuel protests, cargo movement in Peru's main port, Callao, through which 70% of Peru's exports pass, ground to a standstill.[189] "[S]upermarket shelves in Lima emptied, as high gasoline prices made deliveries uneconomical."[190] In Asia, the economies of Thailand, South Korea, the Philippines, and even China face stunted growth prospects if oil prices do not significantly dip below the $30 per barrel range.[191] Run-ups in the price of fuel are particularly dangerous during times of economic hardship, in part because the price of basic commodities such as food and medicine is tied

184. *See* Juan Pablo Toro, *High Petroleum Prices Send Tremors Through Latin American Nations*, OIL DAILY, Oct. 13, 2000, at 5.

185. Larry Elliott, *Oil: G7 Piles Pressure on OPEC with Global Slump Warning: Recession Would Hit Both Rich and Poor, Cartel is Told*, GUARDIAN, Sept. 25, 2000, at 13.

186. Oppel, *supra* note 140, at 1.

187. *See id.*

188. Peter Eisen, *Burlington Resources Chooses Difficult Path into Latin America,* OIL DAILY, Aug. 4, 1999, at 5.

189. *See* Toro, supra note 184, at 5.

190. *See id.*

191. William Drozdiak, *Price Spikes Radically Alter Global Outlook*, INT'L HERALD TRIB., Nov. 15, 2000, at 21.

to the price of fuel.[192]

At least two U.S. recessions are widely attributed by economists to OPEC-induced price shocks: 1973-75 and 1980.[193] Today's oil price increases are comparable in magnitude and speed to those that took place during those periods.[194] Between December 1998 and October 2000, the price of a barrel of oil has more than tripled in value.[195] In 1974, oil moved from $4 to $12 a barrel; in 1980, from $12 to $38 a barrel.[196]

It is not in the interest of the OPEC cartel to provoke recessions, because recessions dampen demand for oil and foster demands for energy conservation.[197] However, every dollar increase in the price of oil entails a significant fiscal windfall for oil-exporting countries.[198] There is a great temptation to raise the price of oil beyond reasonable levels.

OPEC has engineered a price-band mechanism that triggers automatic 500,000-barrels-a-day production cuts or increases if, respectively, prices remain over $28 or sink below $22 for more than 10 consecutive working days.[199] Despite this much-vaunted price band, OPEC frequently overshoots its price targets.[200]

Dissenting voices within OPEC question whether OPEC should strive for any price band at all.[201] During a recent OPEC summit, for example, Venezuela's President, Hugo Chavez,

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192. *Fuel Price Hikes 'a Potential Cause of Political Instability*,' JAKARTA POST, May 6, 1998, *available at* 1998 WL 5442474.

193. Charles Oliver, *CPI Showed Big Gain in September as Soaring Energy Starts to Impact; Now Real Debate Begins: Will High-Priced Oil Force the Fed to Raise Interest Rates? Or Maybe Cut Them?*, INVESTOR'S BUS. DAILY, Oct. 19, 2000, at 10.

194. *See* McDonald, *supra* note 31, at 2A.

195. *See id.*

196. *Id.*

197. *See* Floyd Norris, *Oil Companies Still Reluctant to Spend Profit on Exploration*, INT'L HERALD TRIB., October 29, 2000, at 3D.

198. *Compare Saudi Arabi Put on Creditwatch,* MIDDLE EAST ECON. DIG., Aug. 25, 2000, at 20, *with Nigeria: The State of the Nigerian Economy, by IMF*, AFRICA NEWS, Aug. 24, 2001, *and Emirates GDP Soars 20 Percent in 2000 on Hiked Crude Prices*, AGENCE FRANCE PRESSE, Sept. 10, 2001.

199. Luke Phillips, *Saudi Oil Forum Aims to Bridge Divide Between Producers and Consumers*, AGENCE FRANCE PRESSE, Nov. 15, 2000.

200. *See id.*

201. *See id*.

scoffed at the notion that oil prices are too high.[202] Because a barrel of Coca-Cola would cost $78.70 per barrel while shampoo would cost $2,056 per barrel, at $30 per barrel oil is a bargain.[203] According to Chavez, at currently high oil prices, "Finally, justice was being made."[204]

Ali I. al-Naimi, Saudi Arabia's oil minister, fears an oil glut more than he does a global recession.[205] Although al-Naimi, who has been labeled OPEC's "Alan Greenspan," would like to pilot a smooth landing at the $25-a-barrel price level, he fears that inventories are already building too fast.[206] He has indicated that he prefers to err on the side of high prices, rather than oversupply, despite the fact that at $30 a barrel, oil prices may slow the world's economy and slash the demand for oil.[207] Nami's delicate balancing act is narrowly focused on Saudi Arabia's economic interests, and considers a global recession only insofar as it could negatively impact Saudi Arabia's bottom line.[208]

## IV. THE DISTINCTLY NEGATIVE TREATMENT IN RECENT CASE LAW OF OIL-RELATED ANTITRUST CONSPIRACIES

### *A. Courts Routinely Turn Away Foreign Oil Cases*

No antitrust conspiracy in U.S. history has had effects of comparable magnitude to those perpetrated by OPEC's cornering of the oil market.[209] Oil prices influence every aspect of U.S. economic life and affect monetary policy.[210] However, U.S.

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202. *See* McDonald, *supra* note 31, at 2A.

203. *Id.*

204. Toro, *supra* note 184, at 5.

205. *See* Stanley Reed and Chris Palmeri, *The Alan Greenspan of OPEC?*, BUS. WK., Nov. 27, 2000, at 42.

206. *Id.*

207. *Id.*

208. *See id.*

209. *Compare* James Norman, *'Gas' Station Owner Wins OPEC Injunction*, PLATT'S OILGRAM NEWS, Mar. 30, 2001, at 4, *with The Unfree Market: How Governments and Other Forces Affect the Quality, Quantity and Price of Oil and Gasoline*, *at* http:// www.duke.edu/web/ soc142/team1/section51.html (last visited Sept. 12, 2001).

210. *See* Christopher Farrell, *1970s-Style Inflation? Not This Decade*, BUS. WK., Mar. 27, 2000, at 74; *see also* Robert Siegel, et al., ALL THINGS CONSIDERED, *Fed Chairman Alan Greenspan Says High Oil Prices Continue to Pose Risk to US Economic*

courts routinely throw out cases that implicate foreign governments in oil-related conspiracies.

*1. Interamerican Refining Corp. v. Texas Maracaibo, Inc.*

For example, *Interamerican Refining Corp. v. Texas Maracaibo, Inc.* arose from a boycott by four oil producers operating in Venezuela, all of them well-known American oil companies or their subsidiaries, against a particular New Jersey refinery.[211] Defendants had broken contracts, withheld shipments, and acted in concert.[212] However, they argued that compulsion by the Venezuelan government served as a complete defense and foiled plaintiff's antitrust claim.[213] Indeed, as the court found, the government of Venezuela, which regarded the Venezuelan proprietors of the New Jersey refinery as political enemies, had instigated the boycott—and that, in the court's mind, made all the difference.[214] According to Chief Judge Wright, "It requires no precedent . . . to acknowledge that sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey."[215]

Problematically, though the court shied away from the effects doctrine as developed in *Alcoa* and *Continental Ore*, it failed to address the situs of the alleged conspiracy under the

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*Expansion* (NPR radio broadcast, Oct. 19, 2000) (transcript on file with the Houston Journal of International Law); *see also US-Greenspan Expresses Concern Over Rising Energy Costs*, EFE NEWS SERV., Oct. 19, 2000; *see also* Kevin Ward, *Canada, Other Industrial Countries Sound Warning on High Cost of Crude Oil*, CANADIAN PRESS NEWSWIRE, Sept. 24, 2000, *available at* 2000 WL 27377929; *see also* Knut Engelmann, *Fed Warns of Oil Price Threat*, TORONTO STAR, Oct. 20, 2000, at BU04; *see also* Neal Lipschutz, *OPEC Returns to All-Too-Familiar Role*, PITTSBURGH POST-GAZETTE, June 14, 2000, at C-2; *see also Little to Distract Market from Inflation Fears*, NAT'L POST, Sept. 13, 2000, at D02.

211. 307 F. Supp. 1291, 1292 (D. Del. 1970). The defendants in the lawsuit were Texaco Maracaibo Inc., formerly the Superior Oil Company of Venezuela (Supven), Monsanto Company (Monsanto), Monsanto Venezuela, Inc. (Monven), a wholly owned subsidiary of Monsanto, and Amoco Trading Corporation (Amoco). *Id.*

212. *Id.* at 1292-94.

213. *Id*. at 1294.

214. *See id.* at 1295-96 (referring to political discord between the parties).

215. *Id.* at 1298.

principle of territoriality.[216] Was the boycott perpetrated in Venezuela, where defendants refused to ship the oil, or in the United States, where the oil promised to a particular refinery never arrived?[217]

Because Venezuela at the time had no ongoing countrywide boycott against the United States, defendants probably had U.S. shipments at sea that could have been diverted to supply plaintiff's refinery.[218] Accordingly, it seems reasonable to suggest that the United States was the situs of the illegal boycott. Under the court's reasoning, however, the government of Venezuela could effectively sanction such antitrust violations within U.S. territory.[219]

### *2. Hunt v. Mobil Oil Corp.*

Even when oil-related antitrust litigation involves no sovereign compulsion, a court may decline to exercise jurisdiction given the prospect of a mere inquiry into the official acts of a foreign government. For example, *Hunt v. Mobil Oil Corp*. involved a contract among all oil companies operating in Libya to present a united front against the prospect of the nationalization of their oil fields.[220] The contract provided for proportionate cutbacks among all signatories in the event that governmental action reduced the scale of operations of a particular producer.[221] Moreover, to meet any outstanding contractual obligations, the consortium would guarantee to each member Persian Gulf oil at cost.[222]

To fulfill its obligations under the consortium arrangement, the plaintiff, a small independent oil company, refused to make

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216. *See id*. at 1298-99 (refusing to discuss the relevance of Venezuelan procedures).

217. *See id*. at 1292-93.

218. *But see id*. at 1296 (referring to plaintiff's assertion that a letter from the Venezuelan Minister of Mines and Hydrocarbons provided "incontrovertible proof" that Venezuela had not compelled the boycott).

219. *See id*. at 1298 (discussing the exception to antitrust law that applies when foreign governments require private parties to perform anti-competitive acts).

220. 550 F.2d 68, 71-72 (2d Cir. 1977).

221. *Id*. at 79 (affirming the district court's dismissal of the third claim).

222. *Id.*

any concessions to the Libyan government.[223] Accordingly, it was expropriated.[224] The plaintiff sought as antitrust damages the $125 million in losses sustained from the expropriation, arguing that the consortium arrangement had denied the plaintiff the flexibility necessary to reach a settlement with the Libyan government.[225] According to the plaintiff, the consortium arrangement—despite the fact that it had been cleared in advance by the Justice Department—was a conspiracy to eliminate the competitive threat of cheap Libyan oil to oil from the Persian Gulf.[226]

The Second Circuit, however, declined to review the plaintiff's theories, and summarily dismissed the suit.[227] The expropriation of the plaintiff's oil field was an official act by the Libyan government, and a federal court could not inquire into its validity.[228]

*3. Clayco Petroleum Corp. v. Occidental Petroleum Corp.*

Liability for an antitrust conspiracy may be avoided by implicating the official acts of a foreign sovereign, even where the conspiracy is so egregious it violates other criminal provisions of the U.S. Code. For example, the antitrust claims in *Clayco Petroleum Corp. v. Occidental Petroleum Corp.* arose from a violation of the Foreign Corrupt Practices Act (FCPA) of 1977.[229] An investigation by the SEC revealed that the defendant had bribed a foreign official to deprive plaintiff of an oil concession.[230] However, the Ninth Circuit affirmed the district court's dismissal of the case.[231] Reviewing the plaintiff's antitrust allegations would require the court to inquire into the

223. *Id*. at 71-72.

224. *Id*.

225. *Id*. at 70, 72.

226. *Id*. at 71-72.

227. *See id.* at 70 (citing the appeals court, which affirmed the district court's dismissal of the third claim).

228. *Id*. at 78, n.14.

229. *See* 712 F.2d 404, 407-08 (9th Cir. 1983) (claiming the FCPA precludes the act of state doctrine from barring the antitrust claim).

230. *Id.* at 405.

231. *Id.* at 409.

appropriateness of the allocation of a very important natural resource by a foreign government.[232] "It is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy."[233]

*4. Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*

Finally, despite *Sisal Sales* and *Continental Ore*, courts continue to void oil-related antitrust claims where defendant has induced acts from a foreign sovereign that have anticompetitive effects. For example, in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, the plaintiff had obtained an oil concession from a particular sheikdom in the Persian Gulf.[234] The defendants had allegedly induced the ruler of the adjacent sheikdom, and then the Iranian government, to assert a conflicting territorial claim over the oil concession, thereby depriving the plaintiff of valuable rights.[235] The court dismissed the plaintiff's antitrust claims because a sovereign's decision to assert its national boundaries is not subject to second-guessing by a federal court.[236]

## V. COMITY, THE ACT OF STATE DOCTRINE, AND THE FOREIGN SOVEREIGN IMMUNITIES ACT—A PARTIAL EXPLANATION OF THE DEEP-SEATED ANIMOSITY OF U.S. COURTS TOWARDS ANTITRUST CLAIMS INVOLVING FOREIGN OIL

### *A. Hilton v. Guyot—Introducing . . . The Principle of Comity*

An antitrust lawsuit against OPEC would have to confront more than just the extraterritorial quality of OPEC's behavior. Because OPEC consists exclusively of foreign governments,

232. *See id.* at 406 (stating that an offshore oil concession was an exercise of sovereignty).

233. *Id*. at 407.

234. 331 F. Supp. 92, 95 (C.D. Cal. 1971).

235. *See id*. at 101.

236. *See id.* at 104, 110, 113 (finding that the judiciary is "neither suited nor authorized to pursue" a determination of foreign boundaries, but holding such determination unnecessary and dismissing the case because the act of state doctrine precludes the court from questioning the acts of a sovereign).

other venerable legal principles that would shield their acts from judicial inquiry form part of the equation.[237] The mere participation of a foreign government in an oil conspiracy can foil judicial review, even when the conspiracy does not directly or exclusively concern its territory.[238]

The reluctance by federal courts to review or second-guess the acts of foreign governments can be traced in part to *The Schooner Exchange*.[239] As discussed above, the Supreme Court in *The Schooner Exchange* reasoned that judicial self-restraint promotes mutual respect among governments equally sovereign over their independent territories.[240] A related notion is the principle of comity, famously articulated in 1895 by the Supreme Court in the landmark case of *Hilton v. Guyot*.[241] The principle of comity, however, does not draw from territoriality fictions, and instead highlights the role of everyday administrative convenience.[242]

The main legal issue in *Hilton v. Guyot* concerned the force and effect of foreign judgments, with the Supreme Court refusing to enforce a judgment by a French court absent reciprocal treatment by French courts of U.S. judgments.[243] However, the case is better known for Justice Gray's seminal articulation and analysis of the principle of comity.[244]

In an often-quoted passage, Justice Gray explains the principle of comity and its legal foundation:

'Comity,' in the legal sense, is neither a matter of

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237. *See generally* 9 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 314-15 (West Group 1998) (describing judicial process involving foreign governments, specifically the Foreign Sovereign Immunities Act).

238. *See generally Occidental Petroleum Corp.*, 712 F.2d at 404 (considering several principles affecting judicial proceedings against foreign governments, including sovereign immunity, jurisdiction, and act of state doctrine).

239. *See Schooner Exchange*, 11 U.S. (7 Cranch) at 116 (holding that a peaceful foreign sovereign vessel is exempt from U.S. jurisdiction).

240. *Id*. at 136.

241. *See* 159 U.S. 113 (1885) (explaining how comity of nations is determined).

242. *See* 3 GUIDE TO AMERICAN LAW *Commerce* 53 (West Publishing 1983) (defining "comity" as promoting mutual convenience and respect between nations and describing it as "essential to the success of international relations").

243. *Hilton*, 159 U.S. at 130.

244. *See id.* at 114 (referring to Justice Gray as author of the opinion).

> absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition with which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[245]

Comity is not a matter of substantive law, but rather a procedural rule.[246] Courts are not bound to apply the principle of comity, but frequently do so to avoid unnecessary entanglements in matters that they are not best adapted to resolve.[247] Instead, they defer to the judgment of other decision-making bodies, including courts in foreign countries, foreign governments, and the U.S. Executive.[248]

Comity cannot be mandatory because binding federal courts to follow the errors of foreign tribunals runs afoul of both U.S. law and sound judicial policy.[249] For example, contrary to *Texas Maracaibo*, the principle of comity would not foil the review of an antitrust conspiracy compelled by a foreign government that is perpetrated within the United States.[250] Likewise, contrary to

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245. *Id*. at 163-64.

246. Richard H.M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think it Needs Repairing*, 5 J. INT'L LEGAL STUD. 1, 15 (1999).

247. *See id.* at 15-16 (explaining that where a judge is uncertain as to the applicable law, comity allows for uniformity and avoids confusion until a higher court settles the law).

248. *See Hilton*, 159 U.S. at 163-64.

249. *See* Maloy & Nisi, *supra* note 246, at 15-16 (reasoning that if comity were an obligation, an "indiscreet [sic] action of one court might become a precedent, increasing in weight with each successive adjudication until the whole country was tied down to an unsound principle.").

250. *See supra* text accompanying notes 211-19 (discussing the case of Interamerican Refining Corp. v. Texas Maracaibo, Inc.); *see also* Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972) ("The obvious inability of a foreign state to complete an expropriation . . . of property beyond its borders reduces the foreign state's expectations of dominion over that property . . . Consequently, the potential for offense to the foreign state is reduced, there is less danger that judicial disposition of the property will 'vex the peace of nations,' and there is less need for judicial deference to the foreign affairs competence of the other branches of government."); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 714-16 (5th Cir. 1968) (refusing to give effect to

*Clayco Petroleum*, the principle of comity would not require a court considering an antitrust claim to turn a blind eye on the bribery of a foreign official.[251] The principle of comity necessarily entails a large degree of discretion on the part of the court that would apply it. In *Mast, Foos, Stover Manufacturing Co.*, decided in 1900, Justice Brown explained:

> Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet [sic] action of one court might become a precedent, increasing in weight with each successive adjudication until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in [sic] play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals.[252]

Because the principle of comity is largely discretionary, it does not provide much of a legal shield for those who would violate U.S. antitrust law, including foreign sovereigns, their

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foreign acts affecting property whose situs is the United States).

251. *See supra* text accompanying notes 229-33 (discussing the case of Clayco Petroleum Corp. v. Occidental Petroleum Corp.).

252. 177 U.S. 485, 488 (1900). In 1929, the Supreme Court reaffirmed this description of comity in Sanitary Refrigerator Co. v. Winters, the last time it has spoken on the subject. Maloy and Nisi, *supra* note 246, at 16 n.73.

agents, or instrumentalities.[253] However, through a process of accretion stretching back over 100 years, other doctrines have been superimposed over the principle of comity.[254] Courts often apply these doctrines in a knee-jerk fashion, as a stopgap to serious analysis, particularly impeding thorough review of antitrust claims that implicate foreign sovereigns.[255]

### *B. The Act of State Doctrine—OPEC's Chinked, Titanium Armor*

The act of state doctrine is an abstention doctrine derived from, but distinct from and going further than, the principle of comity.[256] It is also related to the principle of territoriality.[257] The doctrine carves out an exception to the general rule that U.S. courts have the power to adjudicate all claims and redress all wrongs falling under their appropriate jurisdiction.[258] In its traditional formulation, the act of state doctrine precludes U.S. courts from second-guessing the public acts of a recognized foreign sovereign committed within its own territory.[259]

#### *1. Underhill v. Hernandez—The Supreme Court Articulates the Act of State Doctrine*

The Supreme Court first articulated the act of state doctrine in *Underhill v. Hernandez*.[260] By denying him a passport, the revolutionary government of Venezuela had conscripted a U.S. citizen into continuing to operate the water system of the city of Bolivar.[261] Upon his return to the United States, he sought

253. *See Hilton*, 159 U.S. at 163-65 (stating that comity depends on a variety of circumstances and that where there is a conflict of laws a court will prefer the laws of its own country).

254. *See* discussion *infra* Parts II.B-C (discussing the origination and development of the act of state doctrine and Sovereign Immunities Act).

255. *See* discussion *infra* Parts II.B-C (analyzing the application of the act of state doctrine and Foreign Sovereign Immunities Act).

256. *See* Schlossbach, *supra* note 75, at 143-44.

257. *See id*.

258. *Id*. at 141.

259. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

260. 168 U.S. 250 (1897).

261. *See id.* at 251, 252.

amends against the revolutionary leader of Venezuela through a suit before a federal court in New York.[262] The Supreme Court upheld the dismissal of the suit, Justice Fuller reasoning that:

> Every sovereign state is bound to respect the independence of every other sovereign State, *and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory*. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[263]

### 2. *Banco Nacional de Cuba v. Sabbatino—The Supreme Court Redefines the Basis for the Act of State Doctrine*

The principle of comity lies at the bottom of the act of state doctrine.[264] As the Supreme Court would reiterate in *Oetjen v. Central Leather Co.*, the act of state doctrine rests "upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."[265] In *Banco Nacional de Cuba v. Sabbatino*, however, the Supreme Court overlay the classic act of state doctrine with a constitutional basis by grounding it in the separation of powers.[266]

In *Sabbatino*, the Castro regime had expropriated a Cuban corporation owned by U.S. nationals in retaliation against President Eisenhower's restriction of sugar imports from Cuba.[267] A shipment of sugar bound for Morocco was at the docks in a Cuban port the day that the Cuban government issued the expropriation resolution.[268] Payment for that shipment was eventually made to the U.S. nationals instead of the Cuban

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262. *Id.*
263. *Id.* at 252 (emphasis added).
264. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1125 (5th Cir. 1985).
265. 246 U.S. at 303-04 (1918) (internal quotations and citations omitted).
266. 376 U.S. at 423.
267. *Id.* at 401.
268. *See id.* at 403-05.

government, which sued for restitution in U.S. courts.[269]

In a surprising ruling given the political climate at the time, the Supreme Court compelled the return of the sugar monies to the Cuban government.[270] Justice Harlan, writing for the majority, explained that the act of state doctrine compelled this result.[271] However, although the Court was careful to acknowledge the issue of territoriality, its grounding of the act of state doctrine is distinct from that postulated by the Court in *Underhill* (i.e., territoriality).[272] The Court rested its decision upon prudential considerations, including concerns about internal U.S. affairs.[273] In particular, the act of state doctrine seeks to preserve the delicate institutional framework established by the U.S. Constitution.[274] According to Justice Harlan:

> [The act of state doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.[275]

Moreover, by invoking the act of state doctrine, the judiciary recognizes its own institutional shortcomings relative to other branches of government.[276] Justice Harlan continues —

> The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international

269. *See id*. at 401-06.

270. *See id.* at 439 (holding that the judgment of the New York District Court and the Court of Appeals against the Cuban government should be reversed).

271. *See id.*

272. *See* Schlossbach, *supra* note 75, at 146.

273. *Id*.

274. *See id*. at 146.

275. *Sabbatino*, 376 U.S. at 423.

276. *See* Schlossbach, *supra* note 75, at 146.

sphere.[277]

Justice Harlan cautioned that the act of state doctrine was not compelled by the application of first principles, and was in essence discretionary.[278] First, the act of state doctrine is not required by international law.[279] Second, notions of sovereign authority "do bear upon the wisdom o[f] employing the act of state doctrine," but do not compel it.[280] Finally, although the act of state doctrine has "constitutional underpinnings," it is not required by the Constitution.[281]

However, *Sabbatino* is troubling precisely because of the immense breadth it reads into the act of state doctrine.[282] According to the Court, foreign governments standing as plaintiffs before U.S. courts can assert the act of state doctrine.[283] Because the act of state doctrine is essentially a choice of law rule,[284] this potentially allows foreign governments to set the terms of the litigation in which they may become involved. In *Sabbatino*, the Court not only allowed open access to U.S. courts for the arguably hostile Cuban government,[285] but after a brisk rubber stamp as an "act of state," it enforced its expropriation decrees.[286] Under *Sabbatino*, courts in the United States would generally not only be barred from reviewing any antitrust violations attributed to OPEC, they would have to enforce OPEC-driven conspiracies, with OPEC standing as plaintiff.[287]

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277. *Sabbatino*, 376 U.S. at 423.

278. *See id.* at 422-23.

279. *Id.* at 421-22.

280. *Id.* at 421.

281. *Id.* at 423.

282. *Id*. at 440-45 (White, J., dissenting) (arguing that by extending the act of state doctrine to all acts of state expropriating property, American courts would be required to automatically validate some "wrongs cognizable under international law").

283. *See id.* at 437-38.

284. *See* Louis Henkin, *Act of State Today: Recollections in Tranquility,* 6 COLUM. J. TRANSNAT'L L. 175, 178 (1967).

285. *See Sabbatino*, 376 U.S. at 412.

286. *See id.* at 439.

287. *See id*. at 439-40 (White, J., dissenting) (concluding that under *Sabbatino*, "courts are powerless to refuse to adjudicate the claim founded upon a foreign law, they must render judgment and thereby validate the lawless act").

### 3. *First National City Bank v. Banco Nacional de Cuba—The Supreme Court Takes a Second Look at Sabbatino*

The Supreme Court would soon revisit the act of state controversy and the issue of the Cuban expropriations in *First National City Bank v. Banco Nacional de Cuba*.[288] First National City Bank was a creditor of the Cuban government before the Castro regime came to power.[289] It also had several branches in the island, which were expropriated in the wake of the Cuban revolution.[290] In response, First National City Bank quickly liquidated the collateral securing several debts by the Cuban government, and used the excess over principal and interest owed as a set-off for its losses suffered during the expropriation.[291] This time, however, the Supreme Court declined the Cuban government's request for restitution.[292] Although the Court failed to reach a majority opinion,[293] Justice Rehnquist's plurality opinion gave determinative weight to a notice by the State Department expressly to the effect that the application of the act of state doctrine in this case would not advance the interests of U.S. foreign policy.[294]

#### a. *Sabbatino, First National City Bank, and the Berstein Exception—Is the Act of State Doctrine Optional for the Justice Department?*

Both *Sabbatino* and *First National City Bank* involved claims by private individuals against the Cuban government.[295] What if the Executive Branch, through the Justice Department, had actively participated in the litigation on the plaintiffs' behalf? According to both *Sabbatino* and *First National City Bank*, the act of state doctrine is based on separation of powers

288. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

289. *Id.* at 760.

290. *Id.*

291. *Id.* at 760-761.

292. *Cf. id.* at 762 (holding that the counterclaim by the petitioner U.S. bank against the Cuban bank is valid under the act of state doctrine).

293. *Id*. at 760.

294. *See id.* at 767-78.

295. *Sabbatino*, 376 U.S. at 401-03; *First Nat'l City Bank*, 406 U.S. at 760-61.

principles.[296] The Court in *Sabbatino* was concerned with impeding the Executive Branch in its pursuit of unified national policies in foreign relations.[297] Justice Rehnquist in *First National City Bank* focused his inquiry on the potential embarrassment to the Executive.[298]

The Executive Branch is better adapted than the judiciary at assessing the potential impact of litigation on its own policies. Therefore, the Executive should be able to waive the act of state doctrine. In particular, when the Executive itself has initiated the litigation in question, it would seem that the prudential concerns that motivated the Court in *Sabbatino* do not apply.[299] For our purposes, the implication is then clear—to sidestep the act of state doctrine, the Justice Department should itself initiate any antitrust litigation against OPEC, or intervene on private plaintiffs' behalf.[300]

That the act of state doctrine should be discretionary for the Executive Branch is consistent with the so-called *Bernstein* exception to the act of state doctrine, as developed by the Second Circuit.[301] Under the *Bernstein* exception, the act of state doctrine will not apply if the Executive Branch gives written assurance that a lawsuit challenging a particular act of state does not impede the nation in the pursuit of its foreign policy.[302] In fact, the Second Circuit in *Sabbatino* invoked the *Bernstein* exception and allowed the litigation in that case to go forward, basing its ruling on two letters from the Office of the Legal Adviser of the State Department, which it read to give the necessary assurances.[303] However, the Supreme Court reversed,

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296. *Sabbatino*, 376 U.S. at 423; *First Nat'l City Bank*, 406 U.S. at 770.

297. *Sabbatino*, 376 U.S. at 423.

298. *First Nat'l City Bank*, 406 U.S. at 765.

299. *See Sabbatino*, 376 U.S. at 432-33.

300. *See id*.

301. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

302. *See id*. at 375-76 (amending an earlier mandate upon a State Department press release); *see also* Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis*, 33 HARV. INT'L. L. J. 521, 528 (1992).

303. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 858 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964).

"implicitly" repudiating the *Bernstein* exception[304] by announcing that a U.S. court may invoke the act of state doctrine on its own initiative, regardless of the position of the Executive.[305]

In *Sabbatino*, the Executive could not have made its displeasure with the Cuban government more clear. Diplomatic relations had been broken, a commercial embargo had been implemented, and Cuban assets in the United States had been frozen.[306] In fact, the State Department had specifically described the Cuban expropriation law as "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in essence discriminatory, arbitrary, and confiscatory."[307] However, the Court declined to incorporate the position of the Executive into its act of state doctrine analysis:

> Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well after the taking, when such an impact would be contrary to our national interest . . . . In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided.[308]

The stance taken by the Court is perplexing, because it puts the courts in the position of assessing "our national interest," precisely the role that, according to Justice Harlan, the act of state doctrine presumably attempts to avoid for the judiciary.[309] It seems inconsistent with Justice Harlan's own description of the act of state doctrine, whose "continuing vitality depends on its capacity to reflect the proper distribution of functions

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304. *Sabbatino*, 376 U.S. at 436-37.

305. *See id*.

306. *Id*. at 410.

307. Press Release 397, U.S. Ambassador to Cuba Philip W. Bonsal, U.S. Protests New Cuban Law Directed at American Property (July 16, 1960), *reprinted in* DEP'T ST. BULL., Aug. 1, 1960, at 171.

308. *Sabbatino*, 376 U.S.. at 432-33.

309. *Id*. at 423.

between the judicial and political branches of the Government on matters bearing upon foreign affairs."[310]

That the judiciary should abrogate for itself the role of assessing the impact of litigation on foreign relations is inconsistent with the deference counseled by the Supreme Court in *First National City Bank*.[311] In that case, Justice Rehnquist, speaking for himself and for Justices Burger and White, urged the adoption of the *Bernstein* exception.[312] According to Justice Rehnquist's plurality opinion, the act of state doctrine is "buttressed by judicial deference to the *exclusive* power of the Executive over the conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties."[313]

In both *Sabbatino* and *First National City Bank*, the Supreme Court firmly grounded the act of state doctrine in separation of powers principles, magnifying the relevance of the *Bernstein* exception.[314] Although the plurality opinion in *First National City Bank* favored the *Bernstein* exception, the full Court has never formally adopted it, and indeed each of the concurring and dissenting opinions disagreed with the plurality on that point.[315] According to Justice Douglas, for example, the *Bernstein* exception reduces the Court to the status of "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'."[316]

Because the Supreme Court's position with respect to the *Bernstein* exception is unclear, whether the act of state doctrine is mandatory or optional for the Executive Branch will remain an ongoing controversy.[317]

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310. *Id*. at 427-28.

311. *See First Nat'l City Bank*, 406 U.S. at 765.

312. *See id*. at 765-67.

313. *Id.* at 765 (emphasis added).

314. Fox, *supra* note 302, at 527.

315. *See First Nat'l City Bank*, 406 U.S. at 773 (Douglas, J. concurring); *id.* (Powell, J., concurring); *id.* at 777 (Brennan, J., joined by Stewart, J., Marshall, J., and Blackmun, J., dissenting).

316. *Id.* at 773 (Douglas, J., concurring).

317. *Compare First Nat'l City Bank*, 406 U.S. at 767-69 (plurality opinion) (stating that the act of state doctrine does not apply upon the Executive's assurances that the application of the doctrine would not advance the interests of American foreign

*b. Could a Court Withhold the Privileges of the Act of State Doctrine on the Grounds that the Conduct at Issue Violates International Norms?*

Senators Specter and Biden have accused OPEC of violating international law, and have requested a formal complaint before the Hague Tribunal.[318] Conceivably, a finding by the Hague Tribunal that OPEC violates international law would bolster domestic antitrust actions against the cartel.[319] However, a court could find that an affirmative finding by the Hague Tribunal does not amount to conclusive evidence that OPEC in fact violates international law.[320] In that event, *Sabbatino* would largely foreclose judicial review.[321]

In *Sabbatino*, Justice Harlan admitted that Cuba's acts may have violated international law.[322] However, because international opinion was sufficiently divided on the issue of nationalization, international law did not provide a firm basis for resolving the case.[323] Absent universal consensus on the applicable international law, the validity of a foreign act of state is a "political question"[324] that does not provide "judicially discoverable and manageable standards for resolving [cases]."[325]

However, the Court noted that "[t]here are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies," and went on to state that "[t]his decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law."[326] Specifically,

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policy) *with First Nat'l City Bank*, 406 U.S. at 787-89 (Brennan, J., dissenting) (treating the acts of foreign states as nonjusticiable, political questions).

318. Carl Weiser, *Senators Urge U.S. to Sue OPEC over Oil "Conspiracy,"* GANNETT NEWS SERV., Mar. 31, 2000.

319. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. b (1987).

320. *See id.*

321. *See Sabbatino*, 376 U.S. at 428-31.

322. *See id.*

323. *See id.*

324. *See* Sharon v. Time, Inc., 599 F. Supp. 538, 547-48 (S.D.N.Y. 1984).

325. Baker v. Carr, 369 U.S. 186, 217 (1962).

326. *Sabbatino*, 376 U.S. at 430 n.34.

"the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice."[327]

As steep and sustained hikes in the price of oil take their toll on economies around the world, international opinion towards OPEC may turn hostile. In 1998, for example, the Organization for Economic Cooperation and Development ("OECD"), comprising twenty-nine countries, issued a strongly worded resolution declaring that price conspiracies and cartels were illegal under international law.[328] In a separate congress, eleven Latin American countries, including Venezuela, a founding member of OPEC, recently declared that cartels and conspiracies in restraint of trade were illegal.[329]

However, international opinion regarding natural resources cartels may still be too fractured to satisfy the stringent standards postulated in *Sabbatino*. According to the Restatement (Third) of Foreign Relations:

> A claim arising out of an alleged violation of fundamental human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.[330]

Natural resources cartels are not as intensely condemned among the community of nations as instances of state-sponsored torture or genocide.[331] Several U.N. General Assembly resolutions have proclaimed a nation's sovereign authority to

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327. *Id.* at 428.

328. *News Conference with Senator Arlen Specter (R-PA) and Senator Joseph Biden (D-DE); Oil Prices and OPEC,* FED. NEWS SERV., Mar. 30, 2000.

329. *Id.*

330. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF LAW OF THE UNITED STATES § 443 cmt. c.

331. Int'l Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1361 (9th Cir. 1981).

exploit its natural resources as it pleases.[332] Moreover, the U.N. Charter of Economic Rights and Duties of States seems to explicitly condone OPEC:

> All States have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly, all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.[333]

### *4. U.S. v. Alvarez-Machain—Is International Law Still Relevant?*

International law has played a critical role in the U.S. legal system since at least the turn of the 20th century. According to the Supreme Court in *The Paquete Habana*, "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[334]

However, the impact of any finding by the Hague Tribunal may be dampened by the Supreme Court's 1992 decision *United States v. Alvarez-Machain*, which casts a cloud of doubt over the proper place of international law within U.S. law.[335] That controversy involved the kidnapping in Mexico, by a gang bankrolled by the United States, of a Mexican doctor, Humberto Alvarez-Machain, suspected of participating in the torture murder of Enrique "Kiki" Camarena, an undercover DEA

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332. Joseph P. Griffin, *Jurisdiction and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 507-08 (1998).

333. G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 52, U.N. Doc. A/RES/3281 (1974), 14 I.L.M. 251, 255 (1975); *see also* Charles N. Brower & John B. Tepe Jr., *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 INT'L LAW. 295, 314-15 (1975).

334. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

335. *See* U.S. v. Alvarez-Machain, 504 U.S. 655 (1992).

agent.[336] Alvarez-Machain was delivered across the border to U.S. authorities, and immediately faced an indictment in federal court for various criminal violations related to the torture death of Camarena.[337] Alvarez-Machain sued to dismiss the indictment, claiming that his abduction constituted outrageous government conduct in violation of international norms.[338] The Supreme Court, however, with Justice Rehnquist writing for the majority, refused Alvaro-Machain's request.[339]

Clearly, cross-border abductions for law enforcement purposes run afoul of international norms.[340] Both the U.N. Charter and the Charter of the Organization of American States censure international abductions.[341] In fact, governments around the world swiftly and almost universally condemned the Supreme Court's decision in *Alvarez-Machain*.[342] Typical was the reaction of Bolivia's Vice-President Luis Ossio, who described the decision as "a clear violation of international law and an 'illogical and unilateral' measure."[343]

However, Justice Rehnquist refused to interpret the U.S.-Mexican Extradition Treaty, which allegedly barred cross-border abductions, through the lens of international norms, and construed it strictly on its own terms.[344] Accordingly, nothing in its explicit language prevented a U.S. court from proceeding with Dr. Alvarez-Machain's indictment.[345] Whether *Alvarez-Machain* should properly be interpreted as favoring U.S. public policy (which is clearly opposed to antitrust conspiracies) over

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336. *Id*. at 657.

337. *Id.*

338. *Id.* at 658.

339. *Id.* at 670.

340. *See generally* Mark S. Zaid, *Military Right Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout*, 19 HOUS. J. INT'L L. 829, 840-59 (1997) (detailing the reaction around the world to the *Alvarez-Machain* decision).

341. *Alvarez-Machain*, 504 U.S. at 666.

342. *See Reaction to U.S. Supreme Court Decision Endorsing Right to Kidnap Foreigners for Prosecution in U.S.,* NOTISUR, June 30, 1992, *available at* 1992 WL 2410586.

343. *Id.*

344. *Alvarez-Machain*, 504 U.S. at 668-69.

345. *Id.* at 669.

international law (which is doubtful on the issue of natural resource cartels) remains to be seen.

*5. The Act of State Doctrine at the Circuit Level*

Tracing the broad brushstrokes laid by the Supreme Court, the Courts of Appeal have struggled to refine the meaning of the act of state doctrine. In *Mannington Mills, Inc. v. Congoleum Corp*., the Third Circuit Court of Appeals clarified that the act of state doctrine did not bar a U.S. court from reviewing the ministerial acts of a foreign government.[346] Because the act of state doctrine forecloses judicial review over conduct perpetrated abroad that violates either U.S. or international law, it is not to be taken lightly, and requires courts to evaluate the character of the specific acts with respect to which the act of state doctrine is invoked.[347] Accordingly, price-fixing through the oil ministry of an Arab state may not rise to the status of an "act of state."[348]

In *Liu v. Republic of China*, the Court noted that the act of state doctrine does not require U.S. courts to rubber-stamp the criminal acts of a foreign government.[349] "The act of state doctrine is not a jurisdictional limit on the courts, but rather is 'a prudential doctrine designed to avoid judicial action in sensitive areas.'"[350] *Liu* involved a murder case; OPEC is an antitrust conspiracy that has cost consumers around the world trillions of dollars.[351]

346. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1290 (3rd Cir. 1979).

347. *Id*. at 1293.

348. *See id*. at 1296 (stating "The antitrust statutes enacted by Congress commit this country to the free enterprise system and the exercise of open competition . . . . When foreign nations are involved, however, it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.")

349. Liu v. Republic of China, 892 F.2d 1419, 1433 (9th Cir. 1989).

350. *Id*. at 1422-23.

351. *See id*. at 1419.

### C. *The Foreign Sovereign Immunities Act—Congress Steps into the Picture*

#### 1. *The Distinction Between the Sovereign Immunity and Act of State Doctrines*

The sovereign immunity doctrine is related to, but distinct from, the act of state doctrine. During the nineteenth century, the act of state doctrine and the sovereign immunity doctrine were thought to be little more than correlates of each other.[352] *Sabbatino*, however, firmly grounded the act of state doctrine on prudential considerations, and moved it a step back from the territoriality principles applied by *Underhill v. Hernandez*.[353] The act of state doctrine is therefore inherently political, seeking to preserve the Constitution's delicate institutional balance.[354] By declining to interfere with activities common to the Executive Branch, the courts hope to reduce diplomatic friction while avoiding unpredictable complications.[355] In the words of the New York Supreme Court, Appellate Division:

> [Act of state] is a doctrine born of expediency, nourished in the council halls of nations as well as the courts of justice. Its dominant motif is political. It has gained stature in the world of international diplomacy and politics, where an 'incident' involving the dignity of nations is measured by its explosive potential as well as its legal implications.[356]

Both the act of state and foreign sovereign immunity doctrines spring "from the thoroughly sound principle that on occasion individual litigants may have to forgo decision on the

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352. *See Schlossbach*, *supra* note 75, at 142.

353. *See id.* at 145-46.

354. *See id.* at 146-48 (describing the separation of powers ramifications of courts interfering with executive branch policy in international affairs); *see also* First Nat'l Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767-68 (1972) ("The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government.").

355. *See* Schlossbach, *supra* note 75, at 147-48.

356. Frazier v. Foreign Bondholders Protective Council, Inc., 125 N.Y.S. 2d 900, 903 (N.Y. App. Div. 1953).

merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy."[357] However, while the act of state doctrine is prudential in character, the sovereign immunity doctrine addresses a jurisdictional question.[358] The sovereign immunity doctrine draws from "the positivist view that sovereign states are inherently equal, wield essentially absolute jurisdictional power within their own territorial borders, and are essentially powerless elsewhere."[359] Accordingly, sovereign immunity was traditionally "absolute," in the sense that U.S. courts were unconditionally precluded from reviewing the acts of a foreign sovereign.[360]

The "absolute" version of the foreign sovereign immunity doctrine proved unworkable at a time of growing globalization and heavy participation by national governments in activities traditionally associated with the private sector.[361] The potential

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357. *First National City Bank*, 406 U.S. at 769.

358. Fox, *supra* note 302 at 521.

359. Schlossbach, *supra* note 75 at 143. This was the enthusiastic view of Professor Beale, Reporter for the Restatement (First) of Conflict of Laws, who claimed that, "Within his own territory the jurisdiction of the sovereign is exclusive . . . . On the other hand, a sovereign has in general no power or jurisdiction outside his own territory; and he can confer upon his legislature no greater power than he himself possesses." Joseph Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 245 (1923).

360. Schlossbach, *supra* note 75 at 143.

361. Schlossbach, *supra* note 75 at 144.

> Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. There were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country?

*Dunhill*, 425 U.S. at 702-03 (quoting Compania Naviera Vascongado v. The Cristina [1938] A.C. 485, 521-22 (H.L. 1938)).

injury to U.S. businessmen by a doctrine that placed above the rule of law such a substantial category of market participants was too great, and the courts therefore devised a "restrictive" version of the foreign sovereign immunity doctrine.[362] Contrary to the absolute theory of sovereign immunity, courts began to assert limited jurisdiction over foreign sovereigns engaged in commercial activity.[363] In 1952, the U.S. State Department issued the Tate Letter, in which it announced its formal adoption of the restrictive theory of sovereign immunity with respect to the private acts of foreign governments.[364]

*2. Congress Codifies the Sovereign Immunity Doctrine*

In 1976, Congress codified the restrictive version of the sovereign immunity doctrine by enacting the Foreign Sovereign Immunities Act ("FSIA"), legislation intended to introduce uniformity into the process of granting sovereign immunity.[365] The FSIA stands as the sole mechanism for bringing legal action against foreign sovereigns under U.S. law.[366]

Unless an exception applies, under section 1604 of the FSIA, corporations that are owned or controlled by foreign governments are entitled to sovereign immunity.[367] According to section 1603(a), a foreign state includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[368] Section 1603(b) specifies the requirements that an entity must meet before it is properly classified as an agency or instrumentality of a foreign state. First, the entity must be a

362. *Dunhill*, 425 U.S. at 703.

363. Schlossbach, *supra* note 75 at 144.

364. Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in Dunhill*, 425 U.S. app. 2, at 711-15.

365. *See* H.R. REP. NO. 94-1487, at 6-7 (1976), *reprinted in* 1976 USCCAN 6604, 6605-06.

366. 28 U.S.C. §1604 (2001); *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) ("We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.").

367. 28 U.S.C. §1604 (2001).

368. 28 U.S.C. §1603(a) (2001).

separate legal person.[369] Second, the entity must be an organ of a foreign state or a political subdivision thereof, or an entity a majority of whose shares or other ownership interest is owned by a foreign state or political subdivisions thereof.[370] Third, the entity must be neither a citizen of the United States, nor incorporated or otherwise formed under the laws of a third country.[371]

According to the House Report accompanying the FSIA, the definition of "agency or instrumentality" "was intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name."[372]

OPEC operates in the global oil business through distinct entities with widely recognized corporate names carefully groomed through public relations and advertising. Moreover, these corporations, which are a creature of domestic law, are generally either owned or controlled by the national government.[373] For example, Petróleos de Venezuela, S.A. was incorporated in Venezuela in 1976, and is wholly owned by the Venezuelan Government.[374] The company has a well-defined corporate structure, including a President and CEO, a board of directors, and numerous subdivisions and subsidiaries with their respective chief executives.[375]

Although Saudi Aramco is wholly owned by the Saudi Arabian Government, it functions as an independent corporation.[376] Saudi Aramco publishes no less than four glossy

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369. 28 U.S.C. §1603(b)(1) (2001).

370. 28 U.S.C. §1603(b)(2) (2001).

371. 28 U.S.C. §1603(b)(3) (2001).

372. H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 USCCAN 6604, 6614.

373. *See* van der Linde, *supra* note 39, at 12-14.

374. *This Is PDVSA*, *available at* http://www.pdv.com/corporacion_en/corporacion_ueev_en.html (last update July 2001).

375. *Id.*

376. *Organization*, *available at* http://www.saudiaramco.com/aboutus/orgchart.html (last visited Jan. 18, 2000). "Saudi Aramco reports to its owner, the Saudi Arabian Government, through the Supreme Council of Petroleum and Mineral Affairs, chaired by The Custodian of the Two Holy Mosques King Fahd ibn 'Abd al-'Aziz. The Supreme

magazines meant to "promote" cross-cultural understanding between the company and both the Arabic and the English-speaking world.[377] In its 1999 Annual Review, Abdallah S. Jum'ah, President and CEO of Saudi Aramco, describes the company and its social role expressly in corporate terms—

> From the beginning, our *corporate values* have served as a *foundation of all our operations*, and continue to differentiate us from our *competitors*. Among other attributes, our culture encourages adaptability and agility—critical skills in an *industry* currently characterized by fundamental change and *corporate consolidation* . . . . Faced with a challenging *business environment*, Saudi Aramco's employees responded swiftly and with commitment. The collective efforts of all enabled us to *maximize* our *available business opportunities*, and weather *unfavorable market conditions* and *tight margins*. I am proud of our people's response and their embodiment of our *deeply rooted corporate values* in the face of *market adversity* . . . Saudi Aramco takes seriously *its role as a business leader*, an exemplary *corporate citizen*, and a source of technical innovation in the Kingdom.[378]

The Government of Saudi Arabia also regards Saudi Aramco as distinct from itself, despite its property interest in the corporation.[379] According to Ali I. al-Naimi, Saudi Arabia's Minister of Petroleum & Mineral Resources—

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Council of Petroleum and Minerals Affairs sets the company's broadest policy and objectives. Its members are drawn from both the government and the private sectors. Saudi Aramco's Board of Directors, chaired by H.E. The Minister of Petroleum and Mineral Resources, makes high-level planning, budgeting, and project decisions. The company's president is the chief executive officer. To accomplish its mission, Saudi Aramco is organized into key business areas, each headed by a member of corporate management." *Id.*

377. *See* SAUDI ARAMCO WORLD, *available at* http://www.saudiaramco.com/publications/aramcoworld.html (last visited Jan. 18, 2000).

378. SAUDI ARAMCO, 1999 ANNUAL REVIEW, 8-9 (emphasis added), *available at* http:// www.saudiaramco.com. This view is emphasized throughout the document, and is highlighted in large type statements such as: "At Saudi Aramco, it's not only our principal business, but also the spirit that we bring to business. Energy is not simply the product of our fields and facilities; it's what drives our people's performance." *Id.* at 17.

379. *See id.* at 6-7 (referring to Saudi Aramco as an industry leader rather than part of the government).

> Saudi Aramco continues to be in the vanguard of the petroleum *industry* . . . Saudi Aramco's readiness to respond to *consumer* needs, its extensive reserves and production capability, and its capacity to adapt to any and all *market conditions* place the *company* in a unique leadership position in its *industry*.[380]

Strictly in terms of statutory language, it would seem that OPEC oil companies ordinarily would be entitled to immunity from the jurisdiction of U.S. courts.[381] The catch, however, is that the FSIA formally adopts a commercial activities exception to sovereign immunity.[382] Accordingly, a court *must* assert jurisdiction under the following circumstances:

> A foreign state shall not be immune from the jurisdiction of courts in the United States or of the States in any case—
>
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[383]

Instead of ensuring immunity to OPEC-based oil companies, sections 1603(a)(1) and (b) of the FSIA, when viewed in combination with section 1603(a)(2), not only guarantee a U.S. court jurisdiction over their conduct, but require its exercise.[384]

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380. *Id.* (emphasis added).

381. *See* 28 U.S.C. §1603(b)(2) (2001).

382. 28 U.S.C. §1605(a)(2) (2001).

383. *Id.* Under the FSIA, where an exception to sovereign immunity applies, the federal courts have subject-matter jurisdiction over the dispute. 28 U.S.C. §1330(a) (1999); *see* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-89 (1982) (holding that foreign sovereign immunity does not extend to cases arising out of the sovereign's strictly commercial acts).

384. *See* 28 U.S.C. §1603.

### *D. The Commercial Activities Exception—Peeling Off Sovereign Immunity*

#### *1. Alfred Dunhill of London, Inc. v. Republic of Cuba*

In 1976, the same year that Congress adopted the FSIA, a plurality of the Supreme Court articulated in *Alfred Dunhill of London, Inc. v. Republic of Cuba* what came to be known as the "commercial activity" exception to the act of state doctrine.[385] Accordingly, a court may now adjudicate a claim that properly falls within its jurisdiction, even when arising from the conduct of a foreign sovereign within its own territory, so long as that conduct is commercial in character.[386]

*Dunhill* arose out of the expropriation by the Cuban government of major cigar businesses from Cuban nationals, many of whom had fled to the United States when Castro came to power.[387] The cigar businesses involved five leading manufacturers of Havana cigars that regularly exported their product.[388] By the time the Cuban government issued the expropriation decree, the businesses had accrued in their favor considerable indebtedness from several foreign importers.[389] These funds were eventually paid to the Cuban government, instead of the expropriated owners, who sued to recover the amounts paid to the Cuban government.[390] The importers, in turn, claimed that they were entitled to recover—by way of set-off or counterclaim—against the Cuban government, any amounts mistakenly paid.[391]

The Court ruled in the plaintiffs' favor.[392] Justice White

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385. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); *See generally* Russ Schlossbach, Note, *Arguably Commercial, Ergo Adjudicable?: The Validity of a Commercial Activity Exception to the Act of State Doctrine*, 18 B.U. INT'L L.J. 139, 139-40 (2000) (discussing the "commercial activity" exception to the act of state doctrine).

386. *Dunhill*, 425 U.S. at 705-06.

387. *Id.* at 685.

388. *Id.*

389. *Id.* at 685-86.

390. *Id.*

391. *Id.*

392. *Id.* at 694-95.

reasoned in his plurality opinion that the repudiation of a commercial debt was not a sovereign act within the meaning of the act of state doctrine.[393] He noted that the Executive had endorsed the restrictive version of the sovereign immunity doctrine, which carves an exception to immunity for purely commercial acts;[394] that international consensus allowed for the adjudication of commercial claims, and therefore injury to international comity was unlikely;[395] and that the Executive was unlikely to be embarrassed in its functions through the adjudication of commercial cases.[396] Accordingly, the Court espoused the views that Chief Justice Marshall expressed in 1824:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.[397]

*2. The Crucial Question—Does OPEC Conduct "Commercial Activities"? The Clear Answer—Yes.*

§1603(d) of the FSIA defines the term "commercial activity":

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature

393. *Id*.

394. *See id*. at 705 (stating "For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising purely out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if its is given the label 'sovereign immunity.'"); s*ee also* Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 331 (1986).

395. *See Dunhill*, 425 U.S. at 704.

396. *See id.*

397. *See id.* at 695-96 (quoting Bank of the United States v. Planters' Bank of Georgia, 9 Wheat 904, 907 (1824)).

> of the course of conduct or particular transaction or act, rather than by reference to its purpose.[398]

In *Republic of Argentina v. Weltover*, the Supreme Court established a "private person" test to determine whether the standards of section 1603(d) have been met.[399] Accordingly, "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."[400] OPEC member countries are active participants in the oil business through their wholly owned state oil companies.[401] Although OPEC "regulates" oil pricing, it does so not at the domestic level, but at an international level—not the kind of regulation relevant for immunity considerations. [402]

Generally, if a private person would customarily undertake an activity primarily to generate profits, then that type of activity is clearly commercial under the act of state doctrine.[403] Except for the foreign oil cases, courts tend to construe "commercial activity" broadly, and, conversely, have tended to construe "sovereign acts" narrowly.[404] For example, in *Sharon v. Time, Inc.*,[405] the District Court for the Southern District of New York held that *Dunhill* required that acts over which immunity is claimed be proved with a "fairly stringent degree of formality" to represent "official attempts to implement public policy."[406] Accordingly, the acts of a state official who steps outside the scope of his authority are not covered by the act of state doctrine, because they are not "designed to give effect to a State's public interests."[407]

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398. 28 U.S.C. §1603(d).

399. Republic of Argentina v. Weltover, 504 U.S. 607, 614 (1992).

400. *Id.* at 614.

401. *See* International Ass'n of Machinists & Aerospace Workers v. OPEC*,* 649 F.2d 1354, 1355 (9th Cir. 1981).

402. *See id.* at 1357.

403. *See* Letelier v. Republic of Chile, 748 F.2d 790, 796-97 (2d Cir. 1984); *International Ass'n of Machinists & Aerospace Workers*, 649 F.2d at 1357.

404. *See International Ass'n of Machinists & Aerospace Workers,* 649 F.2d at 1357-58.

405. Sharon v. Time, Inc.*,* 599 F. Supp. 538 (S.D.N.Y. 1984).

406. *Id.* at 544.

407. *Id.*

There are few activities so obviously commercial in nature as selling oil for profit.[408] For example, during 1999, Petróleos de Venezuela S.A. (PVSA) had US$31.819 billion in revenues from the sale of crude oil and derived products, US$781 million in revenues from the sale of petrochemical products, and US$32.648 billion in total revenues, according to its consolidated financial statements.[409] The company had net earnings of US$2.818 billion for 1999, US$663 million for 1998, and US$4.505 billion for 1997.[410] Likewise, in 1999, Algeria's Sonatrach had an operating income of US$7.472 billion on export revenues of US$12.188 billion.[411] During 1994, the rate of return on invested capital and shareholder's equity for the Kuwait Petroleum Corporation were 12.2% and 12.9%, respectively.[412] "Both rates far exceed those achieved by similar companies in the oil sector."[413]

The oil companies of OPEC member states are actively involved in every aspect of the oil business, including oil exploration, extraction, and the manufacture, transportation, and distribution of downstream products.[414] For example, in its 1999 Annual Review, Saudi Aramco describes itself not only as the foremost supplier of crude oil and natural gas liquids in the world, but one of the world's foremost integrated oil companies

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408. *See* Neal R. Stoll and Shepard Glodfein, *Antitrust: A Solution to the Oil Crisis?*, 224 N.Y. L.J., Oct. 17, 2000, at 3. According to Sen. Herb Kohl, D-Wis., sponsor of an anti-OPEC bill in front of the U.S. Senate, "The Federal Sovereign Immunities Act, though, already recognizes that the commercial activity of nations is not protected by sovereign immunity, and it is hard to imagine an activity that is more obviously commercial than selling oil for profit, as OPEC nations do." *As Energy Prices Rise, Senate Panel Passes 'NOPEC'Measure,* NAT'L JOURNAL'S CONGRESS DAILY, Sept. 22, 2000.

409. INFORME ANNUAL 1999 DE PETROLEOS DE VENEZUELA, S.A. (PDVSA), INFORMES FINANCIEROS CONSOLIDADOS, *available at* http://www.pdv.com.

410. *Id.*

411. SONATRACH: FINANCIAL REPORT 1999, at 53, 57, *available at* http:// www.sonatrach-dz.com.

412. KPC ACTIVITIES REPORT 94/95, *available at* http://www.kpc.com.kw. The total revenues and net profits for the company during the same period were 5,389.5 million KD and 810.7 million KD, respectively. *See id.*

413. *Id.*

414. *See* van der Linde, *supra* note 39, at 115.

as well.[415] Indeed, the company is the seventh largest producer of refined products in the world[416] and has interests in a number of domestic and overseas refineries, fractionating plants, and petrochemical complexes, as well as one of the largest fleets of oil tankers in the world.[417]

### *E. Callejo v. Bancomer, S.A.—The Act of State Doctrine Meets the FSIA*

It is important to bear in mind that the act of state and the sovereign immunity doctrines are distinct, and have been recognized as such by the Supreme Court.[418]

According to the Fifth Circuit Court of Appeals in *Callejo v. Bancomer, S.A.* —

> Both the sovereign immunity and act of state doctrines are rooted in principles of international comity; both involve a balancing of our interest in providing a forum to injured parties against our interest in maintaining amicable relations with other nations by respecting their sovereign acts. However, the balance struck in regard to each doctrine may be different.[419]

The sovereign immunity doctrine focuses narrowly on the status of the actor whose act gave rise to the complaint.[420] The act of state doctrine focuses more broadly on the sovereign quality of the underlying act.[421] Because the act of state doctrine relates to the traditional reluctance of a U.S court to examine the validity of the public acts of a sovereign within its own territory, a private party not an instrumentality of a foreign state may invoke it as a defense.[422] For example, a private party involved in an antitrust conspiracy compelled by the laws of a foreign sovereign could invoke the act of state doctrine, but not

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415. *See* SAUDI ARAMCO 1999 ANNUAL REVIEW, at 13, *available at* http://www.saudiaramco.com.

416. *Id.* at 18.

417. *Id.* at 33-34.

418. *See Sabbatino*, 376 U.S. at 421-23.

419. Callejo v. Bancomer, S.A., 764 F.2d 1101, 1125 (5th Cir. 1985).

420. *See Sabbatino*, 376 U.S. at 428.

421. *Callejo*, 764 F.2d at 1113.

422. *Id.*

the sovereign immunity doctrine.[423] Moreover, the FSIA only codified the sovereign immunity doctrine,[424] and therefore its enactment did not supersede the act of state doctrine.[425]

The distinction between the act of state and sovereign immunity doctrines has important legal implications, as developed in *Callejo*.[426] In *Callejo*, the Mexican government had instituted exchange control regulations that severely disadvantaged U.S. depositors in dollar-denominated accounts in Mexican banks.[427] The banks had been nationalized, and therefore the Fifth Circuit held that the "commercial activities" exception to the FSIA applied.[428] However, the Court refused to inquire into the validity of the exchange rate regulations,[429] under which the dollar-denominated accounts were converted into Mexican pesos at a below-the-market rate.[430] The Court upheld the dismissal of plaintiffs' suit, deeming the judiciary unsuited to evaluate the propriety of acts taken by Mexico over property located in Mexico.[431]

In sum, because the FSIA and the act of state doctrine are separate defenses with independent legal and theoretical bases, they provide a double wall of immunity against U.S. legal action. Even if the FSIA does not bar adjudication of antitrust claims against OPEC, the act of state doctrine could still apply.

423. *Id.* at 1113-14.
424. *Int'l Ass'n of Machinists*, 649 F.2d at 1359.
425. *Id.*
426. 764 F.2d 1101 (5th Cir. 1985).
427. *Id.* at 1104.
428. *Id.* at 1108-09.
429. *Id.* at 1115-16.
430. *Id.* at 1104.
431. *Callejo*, 764 F.2d at 1125-26.

## VI. THE LATEST STANDARDS, UNCLEAR THOUGH THEY MIGHT BE—HARTFORD FIRE INSURANCE CO. & THE JURISPRUDENTIAL RULE OF REASON APPROACH

### *A. Hartford Fire Insurance Co. v. California—Bringing It All Together, But Leaving Threads Loose*

In *Hartford Fire Insurance Co. v. California*, the Supreme Court examined the impact of the FSIA and the act of state doctrine on the Sherman Act.[432] To what extent should concerns over international comity interfere with the enforcement of U.S. antitrust legislation?

*Hartford Fire Insurance Co. v. California* involved an alleged conspiracy by London reinsurers to coerce primary insurers, by threatening to withhold reinsurance, into restricting the terms under which they were willing to insure.[433] Although the conspiracy had taken place through meetings held abroad, it was alleged to have been intended to affect the market for insurance in the United States and to have indeed produced a substantial effect.[434]

However, the London reinsurers offered evidence indicating that their behavior had been "perfectly consistent" with both British law and practice.[435] Because the "conspiracy" entailed no liability under the law of its situs, it should likewise entail no liability under U.S. law, even if plaintiffs' allegations were all true.[436] The Supreme Court limited its inquiry to the validity of this narrow defense.[437]

Nonetheless, the Court never reached the question of whether allowance for this type of defense was mandated by international comity. Instead, despite a vigorous dissent by Justice Scalia,[438] Justice Souter, writing for the majority, cut the inquiry short. According to Justice Souter, the determinative

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432. 509 U.S. 764 (1993).
433. *Id.* at 764.
434. *Id.* at 796.
435. *Id.* at 798-99.
436. *Id.*
437. *Id.* at 799.
438. *Hartford,* 509 U.S at 793-94.

issue is whether there is a "true" conflict between the laws of the United States and those of the foreign state.[439] No such conflict exists "where a person subject to regulation by two states can comply with the laws of both."[440] And, if no such conflict exists, the inquiry may be properly concluded, without any further evaluation under the act of state doctrine or any comity analysis.[441] Liability for antitrust violations under U.S. law may then properly attach. If, however, a "true" conflict is found, presumably the court will then have to conduct a comity analysis of some sort.

*Hartford Fire Insurance Co.* has been criticized as almost abrogating comity analysis under the act of state doctrine.[442] Some commentators are skeptical that courts will often find that the type of conflict between domestic and foreign laws described in the decision exists.[443] However, the impact of *Hartford Fire Insurance Co.* on antitrust litigation against OPEC may not be as far-reaching as it may be in other contexts.

Strictly speaking, production targets within OPEC are set at the highest ministerial levels, in the course of roundtable negotiations among the cartel's oil ministers.[444] The degree to which a production cut mandate is formalized as national law may vary among OPEC's membership. In Kuwait, for example, after endorsement and submission by the Council of Ministers, the National Assembly ratifies the determinations of the

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439. *See id*. at 798. ("The only substantial question in this litigation is whether 'there is in fact a true conflict between domestic and foreign law.'") (quoting Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987)).

440. *Id*. at 799 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §403, Cmt. e).

441. *Id*.

442. *See e.g.*, Robert C. Reuland, *Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT'L L.J. 159, 161 (1994).

443. *Id*.; *cf.* Russell J. Weintraub, *Response to Reuland, "Hartford Fire Insurance Co., Comity and the Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT'L L.J. 427 (1994) (suggesting that it is reasonable to apply to U.S. law Justice Souter's analysis if the defendants intended to cause anticompetitive effects in the United States).

444. Dr. Rilwanu Lukman*, Oil and Gas: An Industry for the New Millennium*, *available at* http://www.opec.org/NewsInfo/Speeches/sp2000/spLukLondonFeb00.htm.

Supreme Petroleum Council, which has the final say in all matters affecting the oil sector.[445]

In other countries, however, the implementation of production cuts may be a more informal affair. Indeed, in most OPEC countries, a close relationship exists between, on the one hand, the ministries of oil, mining, and finance, and on the other, the national oil company.[446] Job rotations are common, and high-level government officials frequently have done a stint at the national oil company.[447] Presumably, the top management of the national oil company could implement production cuts after a wink and a nod from the relevant ministry.

For purposes of *Hartford Fire Insurance Co.*, a mandate to institute production cuts may only be legally applicable if duly formalized as national law.[448] Only in that case would an oil company be deemed to violate its country's laws should it pump more oil than allowed, giving rise to a "true" conflict between U.S. and foreign antitrust law.[449] The state oil company would only then be a *candidate* for *potential* immunity for having restricted its pumping operations in violation of U.S. antitrust law.

It is also important to keep in mind that OPEC is not a one-level conspiracy. Its sheer magnitude entails a multitude of activities, many of which do not warrant immunity in the first place, because they are not legally compelled by the foreign state.[450] For example, a meeting between the heads of two Arab oil companies to coordinate prices would not satisfy the standard for a "true conflict" postulated in *Hartford Fire Insurance Co.*, and a U.S. court evaluating such conduct might be required to exercise jurisdiction.

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445. *Kuwait – OPEC Middle East Decision Makers*, APS REVIEW DOWNSTREAM TRENDS, Dec. 4, 2000.

446. van der Linde, *supra* note 39, at 13.

447. *Id*.

448. *See Hartford Fire Ins. Co.*, 509 U.S. at 798-99.

449. *See id*; s*ee also* Reuland, *supra* note 442, at 168-69.

450. *International Ass'n of Machinists*, 477 F.Supp. at 560.

### B. *Jurisprudential Rule of Reason—The Ninth Circuit's Approach to Comity Analysis*

If a "true" conflict under *Hartford Fire Insurance Co.* is found, a comity analysis of some sort must follow.[451] There is no definitive method of conducting a comity analysis under the act of state doctrine. However, in *Timberlane Lumber Co. v. Bank of America*, the Ninth Circuit Court of Appeals suggested a well-reasoned approach that has gained acceptance.[452]

*Timberlane* was almost a replay of the facts in *American Banana*. Again, the setting was a plantation in Central America, although the commodity at issue this time was lumber.[453] Claiming unsatisfied bankruptcy obligations before a Honduras tribunal, a competitor had effectively shut down the newly established Timberlane plantation, using the domestic military to cripple its operations.[454] Again, the object of the conspiracy presumably was to restrict exports to the U.S. market.[455]

The alleged conspiracy involved the direct participation of the Honduran government through its military and judiciary.[456] Accordingly, the Ninth Circuit proceeded delicately. "We wish to avoid 'passing on the validity' of foreign acts . . . . Similarly, we do not wish to challenge the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action."[457] However, the court also recognized that mere participation by a foreign government in an antitrust conspiracy is not enough to shield all other participants from liability.[458] To

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451. *See* discussion *supra* notes 426-445 and accompanying text.

452. 549 F.2d 597 (9th Cir. 1976) [hereinafter *Timberlane I*], *on remand*, 547 F. Supp. 1453 (N.D. Cal. 1983) [hereinafter *Timbelane II]*, *aff'd* 749 F.2d 1378 (9th Cir. 1984) [hereinafter *Timberlane III*], *cert. denied*, 472 U.S. 1032 (1985).

453. *Timberlane I*, 549 F. 2d at 604-05.

454. *Id.*

455. *Id.*

456. *Id.*

457. *Timberlane I*, 549 F.2d at 607.

458. *See id.* at 606-07 (quoting United States v. Watchmakers of Switz. Info. Ctr., Inc., 1963 Trade Cas. (CCH) P 70, 600 (S.D.N.Y. 1962), *order modified*, 1965 Trade Cas. (CCH) P 70, 352 (S.D.N.Y. 1965)). According to the "Swiss Watch" case:

> If of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another

carve a middle ground between these two competing considerations, the court developed a methodology that has since become known as the "*Timberlane* test."[459]

The *Timberlane* test has two parts.[460] The court must first determine whether the conduct in question has a direct effect in the United States.[461] If this inquiry leads to an affirmative finding, the court must then determine whether the exercise of jurisdiction would be consistent with international comity, as encapsulated by seven factors.[462] First, the degree of potential conflict with foreign law or policy must be evaluated.[463] Second, the nationality of the parties must be established.[464] Third, the extent to which enforcement by either state will secure compliance must be assessed.[465] Fourth, the relative impact of the challenged conduct in the United States and abroad must be determined.[466] Fifth, the court should evaluate the degree to which the conduct directly targeted U.S. commerce.[467] Sixth, the court should determine the extent to which an effect on U.S. commerce was foreseeable.[468] Finally, the court should weigh the gravity of the violation in the United States relative to its

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> sovereign nation. In the present case, however, the defendants' activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss government. It is clear that these private agreements were then recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate.

*Id.* at 152-53.

459. *Timberlane I*, 549 F.2d at 611-13 (establishing a tripartite analysis for measuring effects on American foreign commerce); *Timberlane II*, 574 F. Supp. at 1462 (affirming the tripartite test established in *Timberlane I*).

460. *Timberlane I*, 549 F.2d at 613; *Timberlane III*, 749 F.2d at 1382.

461. *Timberlane I*, 549 F.2d at 613; *Timberlane III*, 749 F.2d at 1382.

462. *Timberlane I*, 549 F.2d at 613; *Timberlane III*, 749 F.2d at 1382-84.

463. *Timberlane III*, 749 F.2d at 1384.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.* at 1385.

468. *Timberlane III*, 749 F.2d at 1385.

gravity elsewhere.[469]

To varying degrees, the Third,[470] Fifth,[471] and Tenth Circuits[472] have followed the *Timberlane* analysis. The Seventh Circuit, however, declined to treat *Timberlane* as adding anything substantive to the "effects" test under *Alcoa*.[473] The D.C. Circuit has also disagreed with *Timberlane*, rejecting its balancing approach as inherently defective.[474] In 1987, however, the Restatement (Third) of Foreign Relations formally adopted *Timberlane*'s two-part test and its balancing approach.[475]

In fact, the *Timberlane* analysis had been applied by the district court in *Hartford Fire Insurance Co.*[476] The district court had concluded that the London reinsurance business "takes place in a regulatory and competitive framework established by the British government" and that "the evidence of conflict between the [U.S.] antitrust laws and English law and policy is substantial."[477] Weighing this potential conflict with U.K. law and policy against the other *Timberlane* factors, the district court had determined that an extraterritorial extension of jurisdiction would have been improper.[478]

Although the Supreme Court reversed the district court, it did not overturn *Timberlane*.[479] Instead, it placed an additional hurdle that a court must resolve before conducting a traditional

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469. *Id.*

470. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979) (noting "substantial" agreement with *Timberlane*, but devising a more exhaustive "ten-factor" test).

471. *See* Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 885 (5th Cir. 1982) (applying the *Timberlane* two-part/seven-factor test).

472. *See* Montreal Trading, Ltd. v. Amax, Inc., 661 F.2d 864, 869 (10th Cir. 1981) (explicitly applying *Timberlane*).

473. *See In re* Uranium Antitrust Litig., 617 F.2d 1248, 1255 (7th Cir. 1980).

474. *See* Laker Airways Ltd. v. Sabena, Belg. World Airlines, 731 F.2d 909, 948-49 (D.C. Cir. 1984).

475. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§402-03 (1987).

476. *See In re* Ins. Antitrust Litig., 723 F. Supp. 464, 468, 484 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom,* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 778-79 (1993).

477. *In re Ins.*, 723 F. Supp. at 487-89.

478. *Id.* at 488-89.

479. *Hartford Fire Ins. Co.*, 509 U.S. at 779.

comity analysis.[480] Namely, could the defendant conceivably have conducted his affairs without running afoul of either U.S. or foreign law?

Some commentators have criticized *Hartford Fire Insurance Co.* as triggering an almost automatic exercise of jurisdiction under most circumstances, effectively precluding a comity analysis of any type.[481] However, for those arguably few cases where the court actually finds a "true" conflict, *Hartford Fire Insurance Co.* cannot provide the end-all-and-be-all of the analysis, because of the narrowness of the inquiry undertaken by the Supreme Court in that decision.[482] Presumably, the previous case law, including *Timberlane*, would continue to apply, and the court would have to conduct a comity analysis of some sort before deciding whether or not to exercise jurisdiction.

### *C. OPEC Under the Microscope: Would the Oil Conspiracy Withstand a Jurisidictional Rule of Reason Analysis?*

A court would probably find that at least to some extent, OPEC member states compel their domestic oil industry to behave anticompetitively. As discussed, however, a finding of foreign sovereign compulsion (i.e., a "true" conflict of laws) merely allows a court's jurisdictional analysis to continue. In deciding whether or not to exercise jurisdiction, the court will next conduct some sort of the comity analysis, which may take the shape of a straightforward application of the factors in the

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480. *See id*. at 798.

481. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 229 (1993) (stating that a comity analysis balancing foreign sovereignty interests is undertaken only when there is a true conflict between domestic and foreign law); Mary Catherine Pelini, Comment, *The Extraterritorial Jurisdiction in Light of Hartford Fire Insurance Co. v. California: How Peripheral Has the International Comity Notion Become?*, 55 OHIO ST. L.J. 477, 489 (1994) (stating that international comity consideration has been eliminated from the extraterritoriality analysis because of the narrowness of the definition of 'true conflict' in *Hartford*); *cf.* Weintraub, *supra* note 443, at 428-29 (1994) (supporting the application of U.S. law as to all defendants, under any comity analysis, because defendants intended to cause substantial anticompetitive effects in the U.S. with their actions).

482. *See* Pelini, *supra* note 481, at 489.

*Timberlane* test.[483] Alternatively, the court may conduct a more generalized assessment of the competing interests of the United States and the foreign sovereign in the litigation.[484]

*1. The Sovereign Interest of OPEC*

Undoubtedly, OPEC member states have an immense sovereign and political interest in oil exploitation. Most OPEC countries are heavily dependent on oil. In 1990, with oil prices at $10 a barrel, oil contributed to 86% of Venezuela's foreign exchange, 83% of all its tax revenues, and 24% of its GDP.[485] In Nigeria, some 75-80% of federally collected revenue is derived from the exploitation of oil resources, as well as 95% of foreign exchange earnings.[486] In Algeria, oil and gas provide 58% of government revenues as well as 97% of total export revenues.[487]

Likewise, Iran relies on oil and gas for 80-85% of its total export earnings, as well as 36% of its government revenues.[488] Oil also accounts for 23% of Indonesia's total export earnings.[489]

Many oil-producing countries have even amended their constitutions to reaffirm government ownership and control over crucial natural resources such as oil.[490] Because oil production revenues almost always account for a significant share of GDP, foreign exchange earnings, and government budgets, the incentive among OPEC member states to exercise tight control over this important sector of their national economies is very strong.[491] In fact, in most OPEC member states, a close relationship exists between government ministries and the top management of the generally state-owned domestic oil corporations.[492]

Oil revenues fluctuate widely according to the world market

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483. *Timberlane III*, 749 F.2d at 1382.
484. *See In re Uranium*, 617 F.2d at 1254-55; *Laker*, 731 F.2d at 922-23.
485. van der Linde, *supra* note 39, at 113.
486. *Id*. at 94, 113.
487. *Id.* at 94.
488. *Id.*
489. *Id.*
490. *See* van der Linde, *supra* note 39, at 4.
491. *Id.* at 100.
492. *Id.* at 13.

price for oil, leading to fiscal imbalances during periods when prices are depressed.[493] Saudi Arabia's oil revenues dipped from a high of $97 billion in 1982 to a low of $19.5 billion in 1988 and $36.3 billion in 1998.[494] In 1982, oil earnings comprised 98% of the government's revenues.[495] By 1998, that share had dipped to 78%.[496] After the recent run-up in prices, Saudi Arabia is likely to earn about $89 billion from oil exports during the year 2000,[497] an increase of 144% over 1998 levels. In fact, according to some analysts, today, increasing fears about the potential impact of an oil glut on the fiscal health of producer countries enforces cartel discipline within OPEC.[498]

Moreover, the U.S. Supreme Court, in *United States v. California*, a dispute between the U.S. and California governments over oil and gas deposits off the California coast, recognized that control over the exploitation of natural resources is a natural incident to sovereignty.[499]

*2. The Sovereign Interest of the U.S.*

Consumer nations around the world, including the United States, have a fundamental interest in competitively priced oil. *Hilton v. Guyot* recognizes that comity never requires a forum court to abandon "the rights of its own citizens or of other persons who are under the protection of its laws."[500] Accordingly, any domestic court conducting a jurisdictional comity analysis should duly defer to the interest of the United States in upholding its antitrust laws.[501]

Moreover, when U.S. antitrust policies are directly contrary

493. *See id.* at 93.

494. *Id.*

495. *Id.*

496. van der Linde, *supra* note 39 at 93.

497. Stanley Reed & Chris Palmeri, *The Alan Greenspan of OPEC?*, BUS. WK., Nov. 27, 2000, at 42.

498. *See* Kilcarr, *supra* note 24.

499. *See* U.S. v. California, 332 U.S. 19, 29 (1947).

500. 159 U.S. 113, 164 (1895).

501. *See id.* at 165 (noting the frequent inclination of domestic courts, in choosing between conflicting forum laws, to adopt the laws of their own country over the laws of a foreign nation).

to those of another sovereign, the D.C. Circuit Court of Appeals has counseled against deferring to the foreign sovereign.[502] The controversy in *Laker Airways, Ltd. v. Sabena, Belgian World Airlines* involved the applicability of a U.K. antitrust blocking statute under comity principles.[503] The D.C. Circuit recognized that "the differing English and American assessment of the desirability of antitrust law is at the core of the conflict."[504] Accordingly, "an English or American court cannot refuse to enforce a law its political branches have already determined is desirable and necessary."[505]

Primarily, antitrust laws seek to preserve competition, thereby protecting the interests of U.S. consumers.[506] The impact of the OPEC oil conspiracy on consumers at the pump cannot be understated. The increased oil prices during the year 2000 cost U.S. consumers approximately $40.8 billion dollars.[507] For all importing countries, the impact on consumers was about $160 billion dollars.[508] Of this total, $117.2 billion were attributable to increased costs in industrialized countries, while $40.6 billion represented transfers to OPEC from consumers in underdeveloped countries.[509]

OPEC's pricing conspiracy is of such sheer magnitude it can literally make or break the world economy.[510] Although efficiency of oil consumption in the United States has improved by about 25% since 1990, the U.S. economy, like all modern economies, still runs on oil.[511] In fact, since that same year, annual oil

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502. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1983).

503. *Id.* at 916.

504. *Id.* at 949.

505. *Id.*

506. *See* Pfizer Inc. v. India, 434 U.S. 308, 314 (1978).

507. *See* Societe Generale France, *Focus: The Effects of Higher Oil Prices*, MONTHLY ECONOMIC REPORT, Oct. 31, 2000. These figures only take into account transfers to oil producers in the OPEC region, and not to oil producers elsewhere. *Id.*

508. *Id.*

509. *Id.*

510. *Id*.

511. *See* Ed Crooks, *Survey – World Economy: Oil Price Increases Could Derail Growth Train; The Best Outlook for a Decade Is Marred Only by Concerns over the Rising Cost of Fuel*, FIN. TIMES, Sept. 22, 2000, at 1.

consumption in the United States has risen by 11%, and half the country's oil supplies are imported.[512] As in 1973 and 1979, the twin effects of an oil shock and inflation can take a devastating toll.[513] An oil shock can potentially destabilize financial markets, triggering changes in economic behavior (increased household saving rates, reduced investment outlays) that can send an economy spiraling into a deep recession.[514]

For example, the increased oil prices during the year 2000 cost the U.S. economy 0.4% of its GDP.[515] For the developing world, the negative impact was a whopping 1.2%.[516] In fact, analysts estimate that in any given year, every $10 increase in the price of oil costs the U.S. economy 0.2% of its GDP, increases the consumer price index by 0.6%, and reduces the balance of trade by 0.1% of GDP.[517]

As discussed above, in less developed countries, run-ups in the price of oil contribute to political instability. In more developed countries, oil shocks have not yet undermined democratic institutions. However, they are clearly politically unpopular, and could provoke a replacement of the national leadership.[518]

*3. Sovereign Interest of the European Union (EU)*

Strictly on territorial grounds, the OPEC antitrust conspiracy implicates the interests of the European Union. Although the OPEC membership may exploit its oil resources far away from the European Union, OPEC's oil conspiracy is far-flung. As discussed above, OPEC's price fixing conspiracy consists of three distinct phases: the meetings, generally

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512. *Id.*

513. *Id.*

514. Societe Generale France*, supra* note 507.

515. *Id.*

516. *Id.*

517. *See id*. (If the $10 increase in the price of oil is sustained over a two year period, the numbers are 0.2%, 0.6%, and 0.2%, respectively).

518. *See Oil and Tax Combustion Protests: High Taxes, Not Oil Prices, Have Driven European Consumers to the Streets in Anger*, BALTIMORE SUN, Sept. 16, 2000, at 12A ("Prime Minister Tony Blair, who was assumed to be planning an easy re-election campaign, suddenly appears bumbling, inept and unpopular.").

conducted in Vienna or Geneva, where oil prices are fixed; the executive decision in each country to follow the production cuts suggested by OPEC; and the actual exploitation of the oil fields.[519] Because OPEC meets in non-OPEC countries to fix the global price for oil, the interests of those countries should be considered in determining whether international comity requires U.S. courts to take a "hands-off" approach towards the global oil conspiracy.

The three phases of the OPEC conspiracy should not be conflated. More than once, the Supreme Court has indicated that antitrust conspiracies should be viewed as a whole, and that for analytical purposes, it is inappropriate to ignore certain aspects of a conspiracy simply because other aspects predominate.[520] According to Justice White in *Continental Ore*:

> [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' American Tobacco Co. v. United States, 147 F.2d 93, 106 (C.A. 6th Cir.). See Montague & Co. v. Lowry, 193 U.S. 38, 45-46.[521]

In other words, the fact that a given phase of the OPEC conspiracy is exempt from liability by operation of the FSIA or the act of state doctrine does not mean that OPEC's conspiracy is immune from liability in its entirety. Although an aspect of the OPEC conspiracy involves the exploitation of natural resources within sovereign boundaries, the conspiracy is not wholly that.

OPEC generally holds the meetings where it sets the global

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519. *See* discussion *supra* notes 93-103 and accompanying text.

520. *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962); United States v. Patten, 226 U.S. 525, 544 (1913).

521. *Continental Ore Co.*, 370 U.S. at 699.

price for oil in either Vienna or Geneva.[522] OPEC's headquarters are located in Vienna, and a number of meetings have taken place in that city since Austria's accession to the European Union on January 1, 1995.[523] Although Switzerland is not yet a member of the European Union, the country has adopted seven bilateral agreements with the European Union,[524] and Swiss courts regularly consult EU law and apply its principles.[525] Therefore, the interests and the law of the European Union should play center stage during any jurisdictional analysis under the principles of comity.

The OPEC oil conspiracy has an incontrovertible negative impact on both EU consumers and the EU economy. Within the European Monetary Zone ("EMZ") alone (i.e., excluding Britain), the run-up in oil prices during the year 2000 meant for consumers approximately $46.1 billion in increased costs.[526] Because the European Union depends more heavily on oil imports than the United States, its economy is generally more sensitive to upward fluctuations in the price of oil.[527] During the year 2000, within the EMZ the run-up in oil prices shaved off approximately 0.7% from GDP.[528] Analysts estimate that a $10 increase in the cost of oil, sustained over a one-year period, decreases GDP within the EMZ by 0.2%, increases the consumer price index by 0.6%, and reduces the balance of trade by 0.1% of GDP.[529]

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522. *See About OPEC: History, Meetings*, *available at* http://www.opec.org (last visited Jan. 21, 2000).

523. *Id.*; *Austria within the EU*, *available at* http://www.austria.org/euruni.html (last visited Jan. 21, 2000).

524. *See Swiss European Policy: European Policy*, *available at* http://www.europa.admin.ch/europapol/expl/pol/e/index.htm (last modified Aug. 30, 2001).

525. *See Switzerland-European Union: Integration Report 1999*, *available at* http://www.europa.admin.ch/europapol/off/ri_1999/e/index.htm (last modified Aug. 30, 2001).

526. Societe Generale France, *supra* note 507. Again, these figures only take into account transfers to oil producers in OPEC regions, and not to oil producers elsewhere. *Id.*

527. *See id.*

528. *Id.*

529. *Id.* Over a two-year period, the estimates are -0.2%, 1.1%, and 0%, respectively. *See id.*

Moreover, it is not altogether clear that an analysis of OPEC's conspiracy under EU law would absolve the OPEC membership from antitrust liability. In fact, the position of the European Community Commission with respect to international natural resources cartels is distinctly negative.[530] For example, in *Ahlstrom v. Commission* ("*Wood Pulp*"), the European Court of Justice upheld the Commission's asserted jurisdiction on the basis of a version of objective territoriality so expansive, it resembles the effects doctrine under *Alcoa*.[531] The case involved a conspiracy among producers and exporters of wood pulp into the European Union, none of which had representative offices within the European Union.[532] However, the Court focused on where the conspiracy was implemented, interpreting quite broadly what constituted a consummating Act within the Union.[533] Accordingly:

> The decisive factor is . . . the place where [the agreement to fix prices] is implemented.
>
> The producers in this case implemented their pricing agreement within the Common Market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community . . .[534]

Moreover, the Court rejected comity analysis for antitrust litigation, reasoning that a requirement of comity "amounts to calling in question the [Union's] jurisdiction to apply its competition rules . . . and [that] argument has already been rejected."[535]

Although a complete analysis of the issue under EU law is beyond the scope of this article, it would seem that the OPEC oil conspiracy meets the standards for liability postulated under

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530. *See* Ahlstrom v. Comm'n, 1988 E.C.R. 5193, 4 C.M.L.R. 901, 907 (1988) (reviewing and upholding the European Community Commission's exercise of jurisdiction and application of competition rules over foreign wood pulp suppliers in the Community's markets).

531. *Id.*; *see generally* Alford, *supra* note 481, at 225-27.

532. *Ahlstrom*, 1988 E.C.R. at 5197-98, 4 C.M.L.R. at 905-11.

533. *See id.*

534. *Id.* at 5243.

535. *Id.* at 5244.

*Wood Pulp*. *Wood Pulp's* expansive objective territoriality principle is satisfied not only because OPEC's agreement to fix prices is implemented in the European Union, as it is elsewhere in the world, but because the agreement itself is conceived within the European Union.[536]

## VII. CONCLUSION

It has been over twenty years since the Ninth Circuit Court of Appeals dismissed the only antitrust claim against OPEC in U.S. history.[537] The sole grounds for the dismissal was the act of state doctrine.[538] Because the act of state doctrine applied, the Court deemed it unnecessary to examine whether the FSIA also applied.[539]

At the district court level the case had also been dismissed, on three independent grounds.[540] First, the court held that the FSIA did entitle OPEC to immunity.[541] Second, the court found that the plaintiff—a trade union of workers in the transportation and aerospace industries—did not meet the requirements for standing.[542] Third, the court held that under the terms of the Sherman Act, litigation against a foreign sovereign was improper because the statutory language only permits claims against "persons."[543]

The second and third grounds for dismissal at the district court level could have been avoided had the litigation been structured differently. Instead of a trade union acting as the plaintiff, the Justice Department could have brought the litigation forward itself. Instead of naming OPEC or its individual member states as defendants, future litigation should

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536. *See id*.; *About OPEC: Meetings*, *available at* http://www.opec.org (last visited Jan. 21, 2000).

537. *See* Int'l Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

538. *Id.* at 1361-62.

539. *Id.*

540. International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 575-76 (C.D. Cal. 1979).

541. *Id.*

542. *Id.*

543. *Id.*

target OPEC national oil companies as corporate bodies.

Intervention by the Justice Department would have advantages other than resolving the standing issue, such as a potentially more favorable treatment under the act of state doctrine. However, although the Justice Department's Antitrust Enforcement Guidelines subscribe to the *Alcoa* effects doctrine,[544] the attitude of the Clinton Administration towards pursuing such litigation was distinctly negative.[545] Reactions from Republicans have generally been more favorable,[546] although the policy of the Bush Administration remains to be seen.[547] As an alternative, the Sherman Act could be amended to give U.S. citizens statutory standing, as suggested by Rep. Gilman and Sens. Biden and Specter.[548]

It must be emphasized, however, that even after *Hartford Fire Insurance Co.*, comity principles may continue to weigh heavily in the eye of the courts against antitrust litigation targeting OPEC. Indeed, any such lawsuit would be risky business. It would have to confront a shark-infested sea of legal doctrines, with some courts steadfastly wedded to principles borrowed from *American Banana,* at least when it comes to foreign oil. The OPEC conspiracy is truly an international affair, which coordinates the activities of governments and their profit-

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544. *See* Antitrust Enforcement Guidelines for International Operations, *available at* http://www.usdoj.gov/atr/public/guidelines/internat.html (last visited Jan. 21, 2001).

545. *See Hearing of the House International Relations Committee: Organization of Petroleum Exporting Countries (OPEC) Oil Prices and Policies and Their Effect on the U.S. Economy*, FED. NEWS SERV., June 27, 2000.

546. *See Energy Policy Under the Next President, What Does the Future Hold?*, OCTANE WEEK, Nov. 6, 2000, *available at* 2000 WL 28111679; *Cf.* Cathy Landry, *US FTC Unfit to Rule on OPEC Antitrust Question: Official*, PLATT'S OILGRAM NEWS, Mar. 30, 2000, *available at* 2000 WL 14094427 (quoting Republican Rep. Henry Hyde as describing antitrust litigation against OPEC as "nutty").

547. Although the issue was mentioned in a question during John Ashcroft's confirmation hearings as Attorney General, Sen. Ashcroft did not comment on it. *See Day II, Afternoon Session of a Hearing of the Senate Judiciary Committee*, *Subject: Nomination for Attorney General*, FED. NEWS SERV., Jan. 17, 2001 (questioning of Sen. Ashcroft by Sen. Specter at the closing of the day's session).

548. *See High Gasoline Prices Spark Political Furor,* OIL & GAS J., July 3, 2000, at 26; s*ee News Conference with Senator Arlen Specter (R-PA) and Senator Joseph Biden (D-DE), Subject: Oil Prices and OPEC,* FED. NEWS SERV., Mar. 30, 2000.

making instrumentalities across national boundaries, in order to achieve market effects within the territory of third countries. It is therefore ironic and unfortunate that U.S. courts should allow the OPEC membership to shield their conspiracy from antitrust liability by hiding behind the principles of domestic territoriality and sovereignty.

Given the magnitude and sheer costs inflicted by the OPEC oil conspiracy, however, the prospect of failure does not mean that antitrust litigation would not be worth the effort. Moreover, even if litigation in the United States could not dismember OPEC, it would have a salutary, destabilizing effect as some member states scramble to protect their U.S. assets. The prospect of losses from antitrust litigation may sway some OPEC members more than others. For example, Saudi Arabia has considerable economic ties with the United States.[549] By contrast, Iranian assets in the United States and in foreign branches of U.S. banks have been frozen since the Iranian Revolution in 1979.[550] Increasing the heterogeneity among the economic interests of OPEC countries should have the welcome effect of impeding consensus.[551]

Most importantly, antitrust litigation could serve as the proverbial flaming arrow across the bow—a message to OPEC that consuming countries are fed up with high oil prices and may take more radical action than the moral suasion so fruitlessly pursued during the last days of the Clinton Administration.[552]

Finally, it bears remarking that antitrust litigation is not the only tool that consuming countries have against OPEC. In the United States, the President could invoke his power under

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549. *See* BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTES: SAUDI ARABIA, Sept. 1998, *available at* http://usembassy.state.gov/riyad/wwwhback.html (last visited Sept. 12, 2001).

550. *See* M.S. Mendelsohn, *Iran Hostage Deal Leaves Unsettled Issues of International Contract Law*, AM. BANKER, Feb. 3, 1981 at 1; *See* John Daniszewski, *Is an Iranian Overture to U.S. Up Next? Mideast: Leader May Extend Olive Branch in Televised Interview Today*, L.A. TIMES, Jan. 7, 1998, at 1.

551. *See* Shireen T. Hunter, *It Is Premature to Write Off OPEC*, THE CHRISTIAN SCI. MONITOR, Mar. 16, 1983, at 22.

552. *See, e.g.,* David Buchan, *OPEC Ministers Set to Cut Output; US Urges Caution*, FIN. TIMES, Jan. 17, 2001, at 10.

the International Emergency Economic Powers Act ("IEEPA") to declare a national emergency, freezing the U.S. assets of the OPEC membership at a moment's notice.[553] Less radically, the Executive, through normal diplomatic channels, could form a rival organization of importing countries that would function as a monopsony sufficient in scope to undermine OPEC's leverage.

553. *See* 50 U.S.C. §§ 1701-1706 (1988).