NOPEC GOES BANANAS: THWARTING CONGRESS'S ATTEMPT TO EXTEND U.S. ANTITRUST LAW'S EXTRATERRITORIAL REACH

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I. INTRODUCTION

On July 3, 2008, the price per barrel of oil hit an all-time high—in both real and current U.S. dollars—of $145.[1] Six months earlier, the price per barrel was $92.[2] Seven years earlier, the price per barrel was $20—a price at which it had hovered since 1985.[3] This rapid escalation in prices between 2001 and 2008 has been blamed for the current recession.[4] When consumers were forced to spend $4 per gallon of gasoline during the summer of 2008—an increase of 100% from a year earlier—they stopped spending in other places.[5] Total consumer spending fell 2.2%, while spending in specialized areas such as automobiles fell 10% or more.[6] At the same time, consumers uncomfortable with $100 fill-ups at the gas station began abandoning cheap houses in U.S. suburbs for smaller residences nearer to work, and began abandoning gas-guzzling American trucks and S.U.V.s for smaller, more fuel-efficient foreign-made cars.[7] The rapid drop-off in demand left the U.S. housing market with an oversupply of cheap homes and left the U.S. auto industry with an oversupply of large vehicles.[8] As the housing market crumbled and as U.S. automakers tinkered on the edge of bankruptcy, thousands of workers were laid off, sending

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1. James Hamilton, *Causes and Consequences of the Oil Shock of 2007–08*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2009, at 215.

2. *Id.* at 232. This episode qualifies as the largest shock to oil prices on record. *Id.* at 224.

3. *Id.* at 215; *see* BP, *BP Statistical Review of World Energy June 2008*, at 16, *available at* http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2008/STAGING/local_assets/downloads/pdf/statistical_review_of_world_energy_full_review_2008.pdf.

4. *See* Hamilton, *supra* note 1, at 248–58 (explaining the negative effects the sharp spike in oil prices had on the economy).

5. *See id.* at 240–41 (explaining that the consumer would either have to cut spending or reduce saving to purchase the same quantity of energy).

6. *Id.* at 242.

7. *See id.* at 249, 256; Keith Bradsher, *China's Influence Grows With Its Car Sales*, N.Y. TIMES, Apr. 21, 2009, at B3.

8. *See* Hamilton, *supra* note 1, at 248; Keith Johnson, *Oil Shock: Did High Oil Prices Cause the Recession?*, ENVTL. CAPITAL, Apr. 22, 2009, http://blogs.wsj.com/environmentalcapital/2009/04/22/oil-shock-did-high-oil-prices-cause-the-recession/.

ripple effects reverberating throughout the economy.[9] Economists have concluded that, were it not for the rapid increases in oil prices between 2001 and, especially, 2007 and 2008, the U.S. economy would not be in a recession today.[10]

The two key ingredients for the dramatic rise in prices were a low price elasticity of demand and flat physical production levels between 2005 and 2007.[11] The one organization best poised to take advantage of these ingredients is the Organization of the Petroleum Exporting Countries ("OPEC"), an Austria-based cartel of twelve oil-producing sovereign states (each a "Member Country," collectively, the "Member Countries") that controls 76% of global oil supply and 44% of global oil production.[12] Generally viewed as responsible for setting global prices by cutting oil production to achieve revenue targets, the cartel is an easy villain for consumers who are upset at the price they pay at the gas pump.[13] For this reason, the organization has been the subject of a bill introduced sixteen times in Congress since prices began rising.[14] The most recent incarnation of the bill, known as the "No Oil Producing and Exporting Cartels Act of 2009," or "NOPEC," aimed to subject OPEC Member Countries to U.S. antitrust laws with an amendment to the Sherman Act.[15] It intended to override standing case law, which has exempted OPEC and its affiliates from the extraterritorial reach of U.S. antitrust law legislative jurisdiction.[16]

In the summer of 2007, at the height of the oil shock, the NOPEC bill was passed, for the first time, in the House of

9. Hamilton, *supra* note 1, at 251; Johnson, *supra* note 8.

10. Hamilton, *supra* note 1, at 255 (explaining that the oil shock caused the recession to begin).

11. *Id.* at 240.

12. *See infra* notes 20–22, 31–33 and accompanying text.

13. Andrew C. Udin, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U. L. REV. 1321, 1327–28 (2001).

14. *See infra* note 164 and accompanying text.

15. *See* No Oil Producing and Exporting Cartels Act of 2009, S. 204, 111th Cong. (2009) [hereinafter *NOPEC*]; *see infra* notes 164–69 and accompanying text.

16. *See infra* Part II.D.4, 5 and *compare with* notes 164–69 and accompanying text.

Representatives ("House").[17] The bill died in the Senate in 2008, and failed to elicit a vote after Senator Herb Kohl reintroduced it in 2009.[18] If the bill should be raised again in 2010 or 2011 and pass in the Senate, it will return to the House; if it passes in the House, it will be presented to the President for his signature.[19] Assuming, arguendo, that the President would sign NOPEC into law, this paper explores the potential for its success in the American legal system. In the second part, I will describe things as they currently stand, explain OPEC's motivations and effects, outline current U.S. antitrust law and its applicability to extraterritorial cases, remark on the U.S. executive branch's policy with regard to its dealings with OPEC, and discuss case history involving private lawsuits that allege anticompetitive conduct by OPEC. In the third part, I will present a series of legislative attempts—including the NOPEC bill—to extend the reach of U.S. antitrust laws to OPEC's conduct. In the fourth part, I will analyze likely judicial responses to NOPEC—focusing especially on the Supreme Court's probable interpretation—by determining whether NOPEC permits a plaintiff to state a claim upon which relief may be granted and, if so, whether a case brought under NOPEC presents political questions that render the claim nonjusticiable by the court. Finally, in the fifth part, I conclude that the Supreme Court will narrowly interpret NOPEC such that, as things currently stand, no claim can be pleaded against OPEC or its affiliates, and, even if a claim could be pleaded, the case would be barred by the political question doctrine. In other words, I will show that NOPEC's ability to deliver on its promises has been vastly oversold.

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17. *See infra* note 165 and accompanying text.

18. *See infra* note 166 and accompanying text; H.R. 2264, THE LIBRARY OF CONGRESS: THOMAS, http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2264: (last visited Feb. 5, 2010); S. 84, THE LIBRARY OF CONGRESS: THOMAS, http://thomas.loc.gov/cgi-bin/query/z?c111:S.84: (last visited Feb. 5, 2010).

19. U.S. CONST. art. I, § 7, cl. 2.

II. AS THINGS STAND

A. OPEC

OPEC is a political organization.[20] It began as a permanent intergovernmental organization in September, 1960.[21] Its principal aim is "the coordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively."[22] OPEC attempts to achieve this aim by "devis[ing] ways and means of ensuring the stabilization of prices in international oil markets"—specifically, securing agreements by and between Member Countries to enforce production quotas among oil companies operating within their jurisdictions "with a view to eliminating harmful and unnecessary fluctuations."[23] The interests Member Countries set out to safeguard include "the necessity of securing a steady income to the producing countries; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on their capital to those investing in the petroleum industry."[24] In other words, OPEC's Member Countries engage in consensus decision-making to coordinate oil production in a

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20. IAN SKEET, OPEC: TWENTY-FIVE YEARS OF PRICES AND POLITICS 223 (1988) ("Any joint organisation of governments is primarily political even though it may have been set up for economic, social, cultural and other purposes."); *see also* Int'l Ass'n of Machinists & Aerospace Workers ("IAM") v. OPEC, 477 F. Supp. 553, 569 (C.D. Cal. 1979) [hereinafter IAM (I)] ("The action of sovereign nations coming together to agree on how each will perform certain sovereign acts can only, itself, be a sovereign act.").

21. Organization of the Petroleum Exporting Countries [OPEC], *OPEC Statute*, art. 1, Jan. 1961, *available at* http://www.opec.org/library/opec%20statute/pdf/os.pdf (last visited Feb. 5, 2010) [hereinafter "OPEC Statute"]. The countries present at the signing were Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. *Id.*

22. *Id.* art. 2(A). OPEC's Member Countries include Iran, Iraq, Kuwait, Saudi Arabia, Venezuela, Algeria, Angola, Ecuador, Libya, Nigeria, Qatar, and the United Arab Emirates. OPEC, *OPEC Frequently Asked Questions*, at 2, Apr. 2008, *available at* http://www.opec.org/library/what%20is%20OPEC/FAQ.pdf [hereinafter *OPEC FAQ*]. They meet at OPEC Headquarters in Vienna, Austria for collective meetings. OPEC, *General Information*, at 2, Mar. 2009, *available at* http://www.opec.org/library/General%20Information/pdf/geninfo.pdf.

23. *OPEC Statute*, *supra* note 21, art. 2(B); *see also* SKEET, *supra* note 20, at 227 (describing OPEC's strategy with regard to setting quotas).

24. *OPEC Statute*, *supra* note 21, art. 2(C).

way that satisfies global demand at a sustainable price.[25] This section will explore the political and economic motivation that informs OPEC decision-making, and it will explain the impact of OPEC decisions on global and domestic oil prices and supplies.

1. *Political and Economic Motivation*

The politics of OPEC decision-making are far-reaching; Member Countries can ignore neither western allies nor the Arab world when engaged in pricing discussions.[26] Between Member Countries, OPEC works as a treaty expressly requiring that participating countries split demand proportionately to their reserves and implicitly ensuring that no one country ramps up supply in order to bankrupt its neighbors.[27] For most Member Countries—who receive 90% of total state revenue from oil exports—the price of oil is of utmost importance to the internal politics of national security and stability.[28] Price management is also a key factor in the Member Countries' relationships with oil importing countries.[29]

Surprisingly, concerns within the international community about reconciling the diversity of oil supply with its price have brought free market champions such as the United States and the International Energy Agency ("IEA") to understand the need for compromise in the case of oil.[30] A Federal Trade Commission

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25. Udin, *supra* note 13, at 1326. The United States imports 25% of global oil exports, Europe imports another 25%, Japan imports 9%, and the rest of the world imports 40%. BP, *supra* note 3, at 20.

26. *See* SKEET, *supra* note 20, at 232 (discussing Saudi Arabia's interests when simultaneously appeasing the United States and its Arab neighbors); FRANCISCO PARRA, OIL POLITICS: A MODERN HISTORY OF PETROLEUM 335 (2004) ("Price in the industry has always been a political price . . . .").

27. *See* SKEET, *supra* note 20, at 228–29 (explaining that price mechanisms ensure OPEC members have equitable shares of the demand).

28. *Id.* at 227.

29. OPEC Member Countries produce 40% of the world's oil and export 55% of internationally traded oil. *OPEC FAQ*, *supra* note 22, at 11. Major oil importers such as the United States, for whom ready access to oil and petroleum products is necessary to stability and security, seek alliances with and use pressure to influence Member Country decisions. *See, e.g.*, SKEET, *supra* note 20, at 232 ("For Saudi Arabia, its relationship with the [United States] was a continuous and potent concern, since the [United States] was its ultimate guarantor of security.").

30. *See* PARRA, *supra* note 26, at 336 (noting the international agreement that, as

commenter even suggested that "OPEC has now supplanted the Texas Railroad Commission as the ultimate controller of surplus crude production."[31]

2. *Impact of OPEC Decisions on Global Oil Prices and Supplies*

OPEC Member Countries sit atop 76% of the world's proved oil reserves.[32] They are responsible for 43% of global oil production.[33] And ever since they banded together in 1973 to make unilateral pricing decisions[34] without private oil companies at the negotiating table they have introduced a level of volatility to the price of oil that was unheard of in the hundred years before OPEC's ascendancy.[35] Generally, OPEC

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far as oil is concerned, OPEC is necessary to ensure industry stability); JOHN H. WOOD, GARY R. LONG & DAVID F. MOREHOUSE, LONG-TERM WORLD OIL SUPPLY SCENARIOS: THE FUTURE IS NEITHER AS BLEAK OR ROSY AS SOME ASSERT, at fig. 2 (2008), *available at* http://www.eia.doe.gov/pub/oil_gas/petroleum/feature_articles/2004/worldoilsupply/pdf/itwos04.pdf (last visited Feb. 5, 2010) (estimating that, with current global supplies and sustained production growth of 2% per year, the world's conventional crude oil production will peak between the years 2037 and 2047); IAM (I), 477 F. Supp. 553, 569 (C.D. Cal. 1979) (describing consent decrees entered into by the United States with oil companies doing business with OPEC, which grant "specific 'exceptions' and 'permissive provisions' allowing these American companies to engage in price fixing, production control and market allocation programs for crude oil when required to do so by the law of any foreign nation . . . ."). In every other industry, the United States champions the free market and aggressively pursues cartels for their anticompetitive behavior. *See infra* notes 92–99 and accompanying text (discussing the U.S. executive branch's policy against cartels).

31. DAVID I. HABERMANN, PETROLEUM SWAPPING BETWEEN OIL GIANTS (2002), *available at* http://www.ftc.gov/bc/gasconf/comments2/habermanndavidijd.pdf.

32. BP, *supra* note 3, at 6. OPEC Member Countries control 935 thousand million barrels of the world's 1,238 thousand million barrels. *Id.*

33. *Id.* at 8. OPEC produces 35,204,000 barrels daily. *Id.*

34. *See* SKEET, *supra* note 20, at 92, 99 (characterizing OPEC's October 16, 1973 decision to set price targets without input from the oil companies as "the end of one chapter and the beginning of another" in which the Member Countries had real input into domestic oil production schedules). Before 1973, oil "companies had the right to agree, or veto, new regulations" concerning production within the Member Countries. *Id.* at 54.

35. *See* BP, *supra* note 3, at 16 (showing that from 1920 through 1970, the price was relatively constant at about $2.00 per barrel, while the price jumped 1,750% between 1970 and 1980 to $35.00 per barrel). The true scope of OPEC's power first became clear in November 1973 when the Member Countries announced a series of

Member Countries agree, at quarterly meetings, to a price that allows each to earn sufficient revenue to fund necessary development and investment initiatives while maintaining stable markets.[36] After setting an acceptable price, OPEC forecasts the daily demand at which the price would be met.[37] If the forecasted demand is at a level different from current production, OPEC mandates production cuts (or increases)—apportioning the cuts equally among Member Countries[38]—in order to meet the forecasted level.[39] Although OPEC pricing

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production cuts, at 5% per month, to continue until Israeli forces completely evacuated Arab territory occupied during the 1967 Arab–Israeli war. *See* SKEET, *supra* note 20, at 100 (describing the OPEC announcement of the Arab Oil Embargo). Within months of the announcement, the price of a barrel of oil jumped by 500%; within five years, the price jumped by an additional 300%, to fifteen times the 1973 price. *See* BP, *supra* note 3, at 16, chart 2 (charting prices at $2 in 1973, $10 in 1974, and $30 in 1979). Consequently, surging prices forced consumers to better insulate homes, design more fuel-efficient cars, and invest in energy-efficiency manufacturing and other industrial processes, substantially reducing dependence on petroleum products. JAMES L. WILLIAMS, OIL PRICE HISTORY AND ANALYSIS, WTRG Economics, http://www.wtrg.com/prices.htm (last visited Feb. 5, 2010). A rapid political response from the United States and other western countries—most effectively, the United States assured Saudi Arabia, which controls the largest share, at 20%, of the world's proved reserves, military protection against Iran—convinced OPEC to not use oil production as a political weapon. *See* SKEET, *supra* note 20, at 106, 120, 141 (reporting the U.S. response to OPEC's price spike); U.S. Energy Information Administration, Saudi Arabia, http://www.eia.doe.gov/cabs/Saudi_Arabia/Background.html (last visited Feb. 17, 2010) (describing Saudi Arabia as containing one-fifth of the world's proven oil reserves).

36. *See, e.g.*, SKEET, *supra* note 20, at 216 (commenting on the 77th OPEC Conference in April, 1986, at which OPEC decided to increase production by 20% to cut global prices in half).

37. *See Platts: OPEC Output Falls*, ENERGY CURRENT, Apr. 13, 2009, *available at* http://www.petroleumworld.com/story09041313.htm (quoting Platts Global Director of Oil John Kingston) (noting that "OPEC did a fairly remarkable job in stabilizing the market [in 2009]. The supply/demand fundamentals that it faced a few months ago easily could have pushed prices down another $10 or more from their lows. The organization acted decisively, and it shows in the stability around $50.").

38. *See generally* Theodore H. Moran, *The Future: OPEC Wants Them*, 25 FOREIGN POLICY 58 (1977), *available at* http://www.jstor.org/stable/1148023 (discussing historical production-cutting strategies implemented by OPEC member countries in attempts to maximize profits by equating supply with global demand).

39. *See* Platts, *OPEC Cuts Oil Demand Estimates, Warns Markets to Remain Under Pressure* (2009), PLATTS.COM, http://www.platts.com/Oil/Resources/News%20Features/opec/index.xml (last visited Apr. 20, 2009) ("OPEC also reduced the estimated "call" on its own crude in 2009 to 28.74 million b/d, down from a previous forecast of 29.07 million b/d, but above its recent production levels which, using

decisions usually reflect on global prices, OPEC Member Countries' production is usually at near-maximum capacity while they constantly increase production to meet rising global demand;[40] one cannot say for sure prices would be different without OPEC's mandates.[41] Additionally, OPEC agreements are often ignored by individual Member Countries[42]—especially Saudi Arabia, which controls 20% of global supply, the most oil of any country—that increase production in order to curry favor with allies or to address what they see as excessively high prices.[43] Therefore, while OPEC is effective at guiding global prices, it lacks the internal enforcement mechanisms to outright control them.[44]

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secondary sources, it estimated at 27.904 million b/d in March and at 28.22 million b/d over the first quarter of this year.").

40. Hamilton, *supra* note 1, at 226, 228 (noting that Saudi Arabia, for many years the world's most important oil exporter, has historically used its excess capacity to offset short-run supply shortfalls elsewhere and is assumed to continue doing so in response to the long-run pressure of growing world demand).

41. *See* Williams, *supra* note 35 (charting OPEC's historical production figures and oil prices throughout the twentieth century and questioning OPEC's effectiveness at controlling crude oil markets). Global demand for oil has grown a thousand-fold since OPEC's first price mandates, creating more downstream competition for Member Countries' production. *Id. But see Platts: OPEC Output Falls*, *supra* note 37 (quoting Platts Global Director of Oil John Kingston) ("Given that prices have stabilized and output dropped only slightly this month, it's possible we've reached a bottom in OPEC output . . . . If that's the case, OPEC did a fairly remarkable job in stabilizing the market, at least so far. The supply/demand fundamentals that it faced a few months ago easily could have pushed prices down another $10 or more from their lows. The organization acted decisively, and it shows in the stability around $50.").

42. *See Platts: OPEC Output Falls*, *supra* note 37 (reporting that "only Saudi Arabia, Kuwait and Nigeria produced at or below their production targets" in Mar. 2009.).

43. *See, e.g.*, Barbara Lewis, *OPEC Bows to Weak Economy, Obama Effect*, REUTERS, Nov. 15, 2009, *available at* http://www.reuters.com/article/ousiv/idUSTRE52F1FD20090316 (reporting on Saudi Arabia's influence in leading OPEC to maintain supply targets though the price of oil was lower than it would like in order to help ease the global recession of 2009); *see also* SKEET, *supra* note 20, at 229 (explaining that the difference between the price OPEC intended and the price they obtained reflected OPEC's success in dealing with the techniques of price management). Additionally, some countries, such as Iraq, are not subject to production quotas, and are hence uninvolved in cartel decisions. *Platts: OPEC Output Falls*, *supra* note 37.

44. *See* SKEET, *supra* note 20, at 229–30 (noting that success or failure is measured by the commitment of larger producers to play by the rules).

B. U.S. Antitrust Law

United States antitrust law grew up with the domestic oil industry; its extension to the foreign oil industry may not require much of a stretch.[45] Current U.S. antitrust law is grounded in the Sherman[46] and the Clayton[47] Acts. The extraterritorial reach of these Acts is constitutionally limited to "[c]ommerce with foreign Nations, and among the several States, and with the Indian Tribes."[48] This section will explore

45. Many amendments to antitrust laws reflect changes in the importation and use of oil and petroleum products within the United States. *See*, *e.g.*, Naval Petroleum Reserves Production Act, 10 U.S.C. §§ 7420–7438 (2010); Deepwater Port Act, 33 U.S.C. § 1515(d) (2010); Department of Energy Organization Act, 42 U.S.C. §§ 7101–7352 (2010); Gas Price Relief for Consumers Act of 2008, H.R. 6074, 110th Cong. (2008) (attempting to amend the Sherman Act and make it applicable to OPEC Member Countries)*; see* CHARLES F. DORAN, MYTH, OIL, AND POLITICS 71 (1977) (opining that while the American oil industry should not be any more a target of antitrust legislation than other industries, the majority of antitrust laws appear to have been directed at it).

46. 15 U.S.C. §§ 1–7 (2006). The Sherman Act was passed in response to oil and railroad monopolies at the turn of the century and intended to prohibit restraints on free competition among commercial enterprises. *See generally* ALBERT H. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA 2–5 (1910) (describing the context against which the Sherman Act was drafted). It "undeniably remains the centerpiece of U.S. antitrust law." Udin, *supra* note 13, at 1333 (describing the Clayton Act and other antitrust laws as subservient to the Sherman Act).

47. 15 U.S.C. §§ 12–27 (2006); 29 U.S.C. §§ 52–53 (2006).

48. U.S. CONST., art. I, § 8, cl. 3. The limits of the Foreign Commerce Clause have been challenged recently by U.S. attempts to legislate against international terrorism. *See* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 146 (2007) (questioning whether restrictions exist on Congress's ability to extend U.S. law internationally pursuant to the Foreign Commerce Clause) (citing United States v. Clark, 435 F.3d 1100, 1102 (9th Cir. 2006)). The extent of these limits is apparently untested by, thus unknown to the courts. *See Clark*, 435 F.3d at 1102 (writing that "[i]t is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny"). The other constitutional provisions that grant Congress power to extraterritorially legislate are in U.S. Constitution article I, section 8, clause 10, granting the power "[t]o define and punish . . . offences against the law of nations," and in U.S. Constitution article I, section 8, clause 18, granting the power "[t]o make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this constitution in the government of the United States, or in any department or officer thereof," which derivatively reaches the Executive's "foreign affairs power." *See generally* Suikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 300–04 (2001) (discussing Congress's power over foreign affairs). But

the Sherman and Clayton Acts and their extraterritorial reach with regard to conduct by foreign sovereigns.

1. The Sherman Act

The Sherman Act was passed in 1890 in response to intense public concern over the growing number and size of trade combinations.[49] Its two substantive sections focus on preventing cartel behavior[50] and on limiting individual attempts to monopolize.[51] It applies to domestic conduct by all "persons"—or corporations and associations organized under the laws of the United States or of any foreign country.[52] The Sherman Act, however, does not define prohibited conduct.[53] Instead, it establishes federal jurisdiction "to prevent and restrain [antitrust] violations" to the U.S. district courts, and grants the U.S. Attorneys power to bring charges against violating

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to get within the purview of either of these constitutional powers, Congress would have to legislate against crimes against the Law of Nations. *See* Colangelo, *supra*, at 155–56 (discussing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936), and its declaration that the operation of U.S. law in a foreign nation must be governed by the principles of international law). Accordingly, pursuant to the World Trade Organization, unlawful cartels do not include "agreements, concerted practices, or arrangements that: (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws." Working Group on the Interaction Between Trade and Competition Policy, *Background Note by the Secretariat: Provisions on Hardcore Cartels*, WT/WGTCP/W/191, para. 3 (June 20, 2002) (internal quotation marks omitted).

49. *See* George Gunton, *The Economic and Social Aspect of Trusts*, 3 POL. SCI. Q. 385, 385 (1888) ("Our foremost journalists, essayists, orators and publicists unite in warning us against the evil consequences to be expected from the organization of trusts, syndicates and the like."); *see also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 56 (1965) (noting Senator John Sherman's warning to Congress that, due to trusts, "the popular mind is agitated with problems that may disturb social order" (quoting 21 CONG. REC. 2460 (1890))).

50. 15 U.S.C. § 1 (2006). Section 1 makes illegal "[e]very 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 . . . ." *Id.*

51. 15 U.S.C. § 2 (2006). For purposes of this paper, section 2 is irrelevant.

52. 15 U.S.C. § 7 (2006).

53. *See* LETWIN, *supra* note 49, at 95 ("All that we, as lawmakers, can do is to declare general principles." (quoting Senator John Sherman in 21 CONG. REC. 2460 (1890))).

companies.[54] In other words, Congress delegated to the executive and the judiciary its authority to identify and punish conduct deemed anticompetitive under the Act.[55] Antitrust regulation is subject entirely to the common law.[56]

2. The Clayton Act

The Clayton Act was passed in 1914 to correct what legislators viewed as errors and omissions in the Sherman Act.[57] It lists specific types of prohibited conduct,[58] outlines a three-level enforcement scheme,[59] and provides for exemptions[60] and

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54. 15 U.S.C. § 4 (2006). The Executive Office for the U.S. Attorneys, under the leadership of the Deputy Attorney General, manages the U.S. Attorneys. Att'y Gen. Order No. 8–53 (Apr. 6, 1953).

55. Senators John Sherman, George Edmunds, and George Hoar—the principal authors and proponents of the Act—stated that "[i]t does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." LETWIN, *supra* note 49, at 96 (quoting 21 CONG. REC. 2456, 3146, 3148, 3152 (1890)). Basically, Congress punted oversight to the U.S. Attorneys, who it hoped would work with the courts to determine a tenable rule. *See id.* at 96.

56. *See* LETWIN, *supra* note 49, at 98 ("'Restraints of trade,' as the common law understood them, could only come about through agreement between persons; . . . 'monopolize' . . . [also] had a well-known meaning at common law, . . . although the word meant little more . . . than the engrossing of a local food supply." (citing 21 CONG. REC. 3151–52 (1890))). If the House of Representatives has anything to do with it, however, Congress will retake the reins for at least one aspect of antitrust law. *See infra* notes 162–69 (discussing the NOPEC bill).

57. *See generally* EARL W. KINTNER, AN ANTITRUST PRIMER: A GUIDE TO ANTITRUST AND TRADE REGULATION LAWS FOR BUSINESSMEN 22–23 (1964) (distinguishing the Sherman Act's "*actual* and substantial adverse competitive effects" test with the Clayton Act's more lenient test requiring only a "*probable* result of substantially lessening competition").

58. Specific types of prohibited conduct include price, services, or facilities discrimination, 15 U.S.C. § 13 (2006), exclusivity agreements, 15 U.S.C. § 14 (2006), monopolization through stock or asset purchases, 15 U.S.C. § 18 (2006), and interlocking directorates, 15 U.S.C. § 19 (2006).

59. The three levels include suits by persons injured, 15 U.S.C. § 15 (2006), actions by State attorneys general, 15 U.S.C. § 15c (2006), and actions by the U.S. Attorney General, 15 U.S.C. § 15f (2006). The enforcement provisions are at 15 U.S.C. § 21 *et seq.* (2006).

60. Non-profit organizations are exempt from price discrimination provisions. 15 U.S.C. § 13(c) (2006). Labor unions are exempt from all antitrust laws. 15 U.S.C. § 17 (2006).

remedial measures.[61] As with the Sherman Act, the Clayton Act's jurisdiction covers all acts of commerce among the states or with foreign nations.[62] When the Clayton Act applies to conduct of foreign nations, the conduct must have occurred during a "commercial activity" as "determined by reference to the nature of the course of conduct . . . rather than by reference to its purpose."[63] But, as with the Sherman Act, the meaning and interpretation of the Clayton Act is completely at the discretion of the courts.[64]

3. Extraterritorial Reach Over Conduct by Foreign Sovereigns

The antitrust law's extraterritorial reach with regard to foreign sovereigns was tested almost as soon as the Sherman Act was passed.[65] The first lawsuit attempting to apply the Sherman Act's protection against a foreign state's conduct was in 1909, only twenty years after the Act's passage: *American Banana Co. v. United Fruit Co*.[66] It was also the first antitrust case in which courts were denied jurisdiction by the act of state doctrine.[67] In the case, the private plaintiff, an Alabama

61. Restraining violations are listed at 15 U.S.C. § 25 (2006). Injunctive relief is available for private parties. 15 U.S.C. § 26 (2006). Otherwise, all remedies, including treble damages for private plaintiffs, are discussed in 15 U.S.C. §§ 15–16 (2006).

62. 15 U.S.C. § 12(a) (2006).

63. 15 U.S.C. § 15(c)(1) (2006) (referring to 28 U.S.C. § 1603(d) (2006)). In other words, a commercial act, such as contracting to buy cloth, is commercial even if done for a sovereign purpose, such as making uniforms for the army. *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349, 357 (1993) (stating that the commercial conduct must form some aspect of the basic elements of the claim).

64. *See, e.g.*, *Antitrust: Treble Damage Plaintiffs Aided by Expansive Interpretation of Clayton Act Section 5*, 67 COLUM. L. REV. 572 (1967) (Columbia Law Review Association, Inc. eds.) (discussing specific instances of Clayton Act interpretation by the courts).

65. *Compare supra* note 49 and accompanying text (dating the Sherman Act as enacted in 1890), *with infra* note 66 and accompanying text (dating *American Banana* as decided in 1909).

66. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355–56 (1909) (Holmes, J.) (noting that the Sherman Act can reach foreign conduct absent of sovereign acts).

67. *See infra* notes 80–83 and accompanying text (applying the act of state doctrine to a conspiracy between a U.S. company and a foreign sovereign). The act of state doctrine was developed entirely through common law. *See, e.g.*, Frazier v. Foreign

corporation interested in selling bananas from Costa Rica to the U.S. market, sued the private defendant, a New Jersey corporation that controlled a banana export monopoly in Panama, for conspiring with the government of Costa Rica to drive the plaintiff out of business.[68] Upon hearing of the anticompetitive acts, Justice Oliver Wendell Holmes, Jr., writing for the Supreme Court, complained that "[i]t is surprising to hear it argued that they were governed by the [Sherman Act]."[69] Justice Holmes's comment expressed two complementary principles: first, U.S. law does not extend to conduct that occurred outside U.S. jurisdiction and within a foreign state's jurisdiction;[70] and second, U.S. courts are not permitted to judge the legality of a foreign state's sovereign acts.[71]

a. Jurisdictional Concerns

The defendant's conduct, in concert with the Costa Rican government, to limit the plaintiff's ability to operate a banana-exporting business from Costa Rican territory, was not reachable by U.S. antitrust law because it occurred entirely in Costa Rica and in accordance with Costa Rican law.[72] Justice

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Bondholders Protective Council, Inc., 125 N.Y.S.2d 900, 903 (N.Y. App. Div. 1953) (Act of state doctrine "is a doctrine born of expediency, nourished in the council halls of nations as well as the courts of justice . . . , where an 'incident' involving the dignity of nations is measured by its explosive potential as well as its legal implications."). *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 274b (3d ed. 2006) (analyzing the act of state doctrine). For recent applications of the doctrine in antitrust cases, see *infra* notes 114–27 and accompanying text (discussing application of the act of state doctrine to OPEC).

68. *Am. Banana*, 213 U.S. at 354–55. The plaintiff alleged that he was run out of business by the defendant, who controlled the region's banana plantations as well as the only company that exported bananas to the United States, when the defendant instigated the government of Costa Rica to take control of territory through which the plaintiff's railroad operated. *Id.* The railroad was built by the previous owner of the plaintiff's banana plantation in order to create a new exporting route to the United States. *Id.* at 354.

69. *Id.* at 355. Holmes continued: "not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place . . . ." *Id.* at 357.

70. *Id.* at 356.

71. *Id.* at 357–58.

72. *Id.* at 356.

Holmes wrote that this is because of "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[73] According to this principle, it would be unjust and an interference with Costa Rica's sovereignty to apply U.S. antitrust law to the defendant's Costa Rican acts simply because the defendant is personally reachable by U.S. jurisdiction.[74] The Court's construction of the Sherman Act thus limited the statute in operation and effect to the Court's territorial jurisdiction.[75]

In the years since *American Banana*, however, courts have routinely rejected Justice Holmes's construction of the Sherman Act's extraterritorial reach.[76] Now, U.S. antitrust law applies to foreign conduct that was "intended to affect imports [to the United States] and did affect them."[77] This concept was codified in the Foreign Trade Antitrust Improvements Act ("FTAIA") of 1982, which says that all conduct involving certain commerce not for importation is subject to the Sherman Act if it (a) has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce, and it (b) gives rise to a claim under the Sherman Act.[78] The only hurdles to the Sherman Act's

73. *Id.*

74. *Id.* at 356.

75. *Id.* at 357. "All legislation is prima facie territorial. . . . We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute . . . ." *Id.* (citation omitted).

76. *See*, *e.g.*, Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707–08 (1962) (holding that the Sherman Act can reach foreign conduct absent of sovereign acts).

77. United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 444 (2d Cir. 1945). This test is known as the Effects Doctrine. *See, e.g.*, Stanley D. Metzger, *The "Effects" Doctrine of Jurisdiction*, 61 AM. J. INT'L L. 1015, 1015 (1967) (stating that the "ALCOA case contains the classic statement of the 'effects' doctrine of territorial jurisdiction of a state.").

78. Export Trading Company Act of 1982, Pub. L. No. 97–290, §§ 401–403, 96 Stat. 1233, 1246 (codified at 15 U.S.C. § 6a (2006)) (enacting the FTAIA). Application of the FTAIA, section 6a of the Sherman Act, has proved difficult primarily because of the statute's poor drafting. *Compare* Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 287 (2007) ("The enactment of the FTAIA then, has had the effect of adding an 'inelegantly phrased' and 'opaque' statute to an area of the law that was already 'confused and unsettled.'" (citing United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4 (1st Cir. 1997))), *with* Donald J.

extraterritorial reach exist in courts' understanding of "direct, substantial, and reasonably foreseeable effect."[79]

b. Prudential Concerns

Costa Rica's conduct, because ratified by the government for a public purpose, was protected as sovereign.[80] By adjudicating the case against the defendant, therefore, the Court would be forced to rule on the legality of Costa Rica's sovereign acts.[81] The private defendant's acts—because in concert with Costa Rica's acts—were protected by the act of state doctrine,[82] just as if they

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Baker & W. Todd Miller, *Antitrust Enforcement and Nonenforcement as a Barrier to Imports — with Illustrations from the Japanese Film Dispute*, 24 EMPIRICA 83, 90–91 (1997) (arguing that the FTAIA's inelegant language was intended to restrain foreign conduct only if it was proved such conduct had a direct effect on U.S. commerce).

79. *See infra* notes 183–94 and accompanying text (analyzing the "direct, substantial, and reasonably foreseeable effects" language).

80. *Am. Banana*, 213 U.S. at 359. The government of Costa Rica became involved when Panama revolted and declared independence from Columbia. *Id.* at 354–55. A claim to a right over the territory on which the railroad sat was disputed by the Costa Rican and Panamanian governments, the former of which stationed troops on it and prevented any movement or development in the region. *Id.* A valid argument could be made that Costa Rica prevented development on the railroad, or movement of shipments thereon, for national security purposes.

81. *See id.* at 356. The Supreme Court held, therefore, that "[a] conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." *Id.* at 359. The conspiracy to which Holmes refers is the agreement of the U.S. company with a foreign government to restrain export trade from Costa Rica. *Id.* at 354–55. All of the prohibited conduct with regard to commerce, however, occurred in Costa Rica. *Id.* As explained by the court in *United States v. Yunis*,

> Congress has plenary power to regulate the flow of commerce within the boundaries of United States territory. But it is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States.

681 F. Supp. 896, 907 n.24 (D.D.C. 1988). A few current courts continue to agree with this basic principle. *See, e.g.*, Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 988 (9th Cir. 2008) ("Recognizing the importance of avoiding international conflicts of law in the area of intellectual property, however, we have applied a more robust version of this presumption to the Copyright Act, holding that the Act presumptively does not apply to conduct that occurs abroad even when that conduct produces harmful effects within the United States.").

82. *See infra* notes 114–27 and accompanying text (discussing application of the act of state doctrine to OPEC). The act of state doctrine, though unnamed in the case, was

were committed by a foreign sovereign.[83]

Costa Rica's conduct, however, was not afforded the act of state doctrine's protection simply because Costa Rica was a sovereign state.[84] If the state exercised "only those powers that can also be exercised by private citizens"—purely commercial operations for profit,[85] with no need for governmental authority—then its acts would not be protected.[86] Its conduct is thus conditionally subject to U.S. antitrust laws.[87] But if the acts are inherently public in nature—including commercial operations that are politically motivated[88] or carried on with

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certainly implicated.

83. *See Am. Banana*, 213 U.S. at 359.

84. *See supra* note 80 and accompanying text (arguing for a public purpose behind Costa Rica's seizure of American Banana's property).

85. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976). "Because the act relied on by respondents in this case was an act arising out of the conduct by Cuba's agents in the operation of cigar businesses for profit, the act was not an act of state." *Id.* at 706. This case is easily distinguishable from *American Banana* because in this case the Cuban government, after seizing Cuban businesses, kept payments mistakenly mailed post-seizure for pre-seizure accounts. *Id.* at 689–90. Without judging the legality of the seizures, the Supreme Court held that, based on the Law of Nations, the prior owners were due just compensation for their assets. *Id.* at 687 (citing Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966)).

86. *Alfred Dunhill*, 426 U.S. at 704–06 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964)). Most commentators on the subject misunderstand the distinction between the act of state doctrine and the extraterritoriality issue, believing that any commercial act necessarily rejects act of state analysis, and thus they apply U.S. antitrust laws extraterritorially. *See, e.g.*, S.W. O'Donnell, *Antitrust Subject Matter Jurisdiction Over State Owned Enterprises and the End of Prudential Prophylactic Judicial Doctrines*, 26 SUFFOLK TRANSNAT'L L. REV. 247, 253 (2003) ("With such an unsettled foundation, it is not surprising that the rule on extraterritorial jurisdiction in *American Banana* began to erode almost as soon as it was decided."); Andres Rueda, *Price-Fixing at the Pump: Is the OPEC Oil Conspiracy Beyond the Reach of the Sherman Act?*, 24 HOUS. J. INT'L L. 1, 19 (2001) ("The Supreme Court has never formally overruled *American Banana*, but has in numerous occasions explicitly distanced itself from its reasoning.").

87. *See Alfred Dunhill*, 425 U.S. at 705–06 (holding that a Cuban government-owned company's acts were not public because the company was a purely commercial operation intended to earn profit).

88. *See, e.g.*, Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir. 1977) (applying act of state doctrine after nationalization of assets owned by a U.S. company, based on a statement by the Libyan government that "we proclaim loudly that this [sic] United States needs to be given a big hard blow in the Arab area on its cold, insolent face. . . .

public goals such as national defense[89] or regulation of resources[90]—the acts are protected.[91]

C. The Executive's Foreign Antitrust Policy

The Department of Justice ("DOJ"), the executive branch's enforcer,[92] has expressed great aversion to private cartels—

The time has come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost.") (ellipsis in original).

89. *See, e.g.*, In re Investigation of World Arrangements with Relation to the Prod., Transp., Ref. & Distrib. of Petroleum, 13 F.R.D. 280, 290–91 (D.D.C. 1952) (applying act of state doctrine in antitrust case against oil company owned by British government for national defense purposes).

90. *See*, *e.g.*, In re Refined Petroleum Prods. Antitrust Litig., 649 F. Supp. 2d 572, 598–99 (S.D. Tex. 2009) [hereinafter *In re RPP*] (applying act of state doctrine to case brought against oil companies alleging conspiracies with foreign sovereigns, whose production decisions were influenced by national concerns to conserve petroleum resources).

91. *See Alfred Dunhill*, 425 U.S. at 706 (noting that act of state doctrine applies in antitrust cases to sovereign acts of foreign states); *see also In re RPP*, 649 F. Supp. 2d at 597 (applying act of state doctrine in private action against U.S. subsidiaries of OPEC Member Country affiliated oil companies, because to declare illegal the acts of the U.S. subsidiaries would force the court to declare illegal the Member Countries' production decisions); *Hunt*, 550 F.2d at 76 (applying act of state doctrine to antitrust action brought only against oil companies, who conspired with Libyan government to exclude Hunt Oil from Libya, because to rule on the companies' actions would force the court to decide the legality of Libya's act); Huffman, *supra* note 78, at 291 ("Properly understood, [*American Banana*] is not an antitrust extraterritoriality case at all, but an early application of the 'Act of State doctrine,' under which U.S. courts will not exercise jurisdiction over acts by a foreign sovereign."). Alternatively, a court could rely on the doctrine of sovereign immunity. *See Alfred Dunhill*, 425 U.S. at 705 n.18 ("The State Department has concluded that in the commercial area the need for merchants 'to have their rights determined in courts' outweighs any injury to foreign policy. This conclusion was reached in the context of the jurisdictional problem of sovereign immunity. We reach the same one in the choice-of-law context of the act of state doctrine."). The sovereign immunity doctrine was enacted by the Foreign Sovereign Immunity Act ("FSIA") of 1976, H.R. Rep. No. 94–1487, at 6–7 (1976), codified at 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611, which created limitations to U.S. jurisdiction over the sovereign acts of foreign nations. The FSIA made foreign nations immune from suit for certain sovereign acts. *See* 28 U.S.C. § 1064 (2006). Courts do not have jurisdiction because there is no case or controversy under U.S. law. U.S. CONST., art. III, § 2, cl. 1.

92. *See* Whitehouse.gov, The Executive Branch, http://www.whitehouse.gov/our_government/executive_branch/ (last visited Feb. 5, 2010) ("The mission of the Department of Justice (DOJ) is to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic;

domestic and international—and is determined to eradicate them from the global market in order to foster international competition.[93] At the same time, however, the DOJ adheres closely to the act of state doctrine; it does not want U.S. antitrust laws to "regulate the competitive conditions of other nations' economies."[94] In its guidelines, the DOJ is careful to

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to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.").

93. R. Hewitt Pate, Acting Assistant Att'y Gen., Dep't of Justice Antitrust Div., Address at the British Institute of International and Comparative Law: Anti-Cartel Enforcement: The Core Antitrust Mission 2–3 (May 16, 2003), *available at* http://www.justice.gov/atr/public/speeches/201199.pdf. The DOJ has coordinated extensive international cartel investigations with authorities in the United States, European Union, Canada, Japan, Australia, Korea, Brazil, and Mexico. *Id.* at 4, 7. *But cf. Ex-Morgan Crucible Chief Wins U.K. Extradition Ruling*, BLOOMBERG, Mar. 12, 2008, *available at* http://www.rjw.co.uk/latest-news/article/ex-morgan-crucible-chief-wins-uk-extradition-ruling/ (discussing a British court's decision to prevent extradition of a CEO charged with price-fixing because the price-fixing occurred before passage of the Enterprise Act, which permits extradition to the United States).

94. Pate, *supra* note 93, at 12 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 (1986)). As far as the DOJ is concerned, even the FTAIA's amendment to the Sherman Act, which allows antitrust claims against foreign defendants if the defendants' anticompetitive conduct affects U.S. domestic commerce, "was never intended to alter that fundamental principle." *Id.* at 11–12. *See generally* Huffman, *supra* note 78 (describing the FTAIA). The United States has entered into treaties with foreign sovereigns promising that such is true. *See, e.g.*, Provisional Agreement between the United States of America and the Kingdom of Saudi Arabia in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce, and Navigation, art. IV, Nov. 7, 1933, 48 Stat. 1826, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005330.asp [hereinafter Provisional Agreement] ("Nothing in this Agreement shall be construed as a limitation of the right of either Government to impose, on such terms as it may see fit, prohibitions or restrictions of a sanitary character designed to protect human, animal, or plant life, or regulations for the enforcement of police or revenue laws."). That said, the Sherman Act is directly applicable to import commerce. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS, § 3.11 (1995) [hereinafter INTERNATIONAL GUIDELINES]. As an example of what accounts for anticompetitive import commerce, the DOJ wrote, "A, B, C, and D are *foreign companies* that produce a product in various foreign countries. None has any U.S. production, nor any U.S. subsidiaries. They organize a cartel for the purpose of raising the price for the product in question. Collectively, the cartel members make substantial sales into the United States, both in absolute terms and relative to total U.S. consumption." *Id.* at ex. A54 (emphasis added). The limitation of jurisdiction to "foreign companies" was not accidental. And in case a foreign country gets swept into a private suit, the DOJ provides four doctrines that exempt foreign sovereign acts: sovereign immunity doctrine,

limit its jurisdiction to "foreign monopolist[s]" or "cartel[s] of foreign enterprises."[95] To this end, in consent decrees with major U.S. oil companies, the DOJ granted exceptions allowing companies to violate the Sherman Act when required to do so by the law of any foreign nation[96]—so long as the oil companies agreed to not act in combination with foreign oil companies that fixed prices, allocated territories, restricted imports or exports, excluded distributors from territories, or allocated production within foreign countries.[97] In other words, the DOJ is serious about stopping conspiracies between private foreign companies but unwilling to interfere with lawful agreements between private companies and foreign states.[98] In so acting, the DOJ respects the President's policy of diplomatic negotiations as the only government-led strategy to challenge the conduct of foreign sovereigns.[99]

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sovereign compulsion doctrine, act of state doctrine, and the Noerr-Pennington doctrine. *Id.* §§ 3.3–3.34.

95. INTERNATIONAL GUIDELINES, *supra* note 94, § 3.121. The DOJ explained that where a foreign cartel with no U.S. ties uses an innocent intermediary to sell its product to the United States, the DOJ could still pursue charges against the cartel members; the harm would be the possibility of the cartel operating, however, rather than the illegal conduct. *Id.* at ex. B. Moreover, from the DOJ's description, it appears the DOJ would not pursue charges against the intermediary. *See id.* (opining that "the Agencies would focus on the potential harm that would ensue if the conspiracy were successful, not on whether the actual conduct in furtherance of the conspiracy had in fact the prohibited effect upon interstate or foreign commerce.").

96. This exception is now a part of DOJ orthodoxy. *See* INTERNATIONAL GUIDELINES, *supra* note 94, § 3.32 ("Under *Hartford Fire*, if it is possible for the party to comply both with the foreign law and the U.S. antitrust laws, the existence of the foreign law does not provide any legal excuse for actions that do not comply with U.S. law. However, a direct conflict may arise when the facts demonstrate that the foreign sovereign has compelled the very conduct that the U.S. antitrust law prohibits."); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

97. *See, e.g.*, United States v. Standard Oil Co. (N.J.), 1960 Trade Cas. (CCH) ¶ 69,849, at 77,339–40 (S.D.N.Y. 1960); United States v. Gulf Oil Corp., 1960 Trade Cas. (CCH) ¶ 69,851, at 77,348–49 (S.D.N.Y. 1960). Per se offenses, such as price fixing, are considered criminal offenses and punishable by fines up to $10 million and three years imprisonment. INTERNATIONAL GUIDELINES, *supra* note 94, § 2.1.

98. *See supra* notes 65–91 and accompanying text (discussing *American Banana*, the first antitrust case alleging conspiracy between a private corporation and a foreign sovereign, and its holding that both were protected by the act of state doctrine).

99. *See, e.g.*, Lewis, *supra* note 43 (OPEC decided to resist supply cuts, even though price per barrel of oil was around $25 off the optimum price to spur investment and

D. Private Attempts to Apply U.S. Antitrust Law to OPEC in the Courts

Although the executive branch has decided against pursuing OPEC and its Member Countries for violations of U.S. antitrust law, the possibility of judicial redress for OPEC's conduct still exists: no branch of government has restricted private plaintiffs from bringing cases against the cartel.[100] Courts are unusually permissive[101] when deciding whether to hear claims brought under U.S. antitrust laws: a plaintiff needs only meet the notice standard described in Federal Rule of Civil Procedure 8(a)(2).[102] This notice standard requires "a short and plain statement of the claim showing that the pleader is entitled to relief"[103] such that the defendant is notified about the claim and upon what grounds it rests.[104] Therefore, assuming that everything in a complaint is true, a plaintiff will likely have her antitrust claim heard if the factual allegations "raise a right to relief above the speculative level."[105] In cases against OPEC, its Member

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development, because President Obama called the King of Saudi Arabia to discuss the global need for cheaper energy during the recession; the OPEC Secretary-General commented that "[w]e have seen a positive approach. [The United States is] ready for dialogue and we are ready for dialogue and ready for talk."). Additionally, in bilateral investment treaties entered into between the U.S. and OPEC Member Countries—power over which is constitutionally delegated to the President with the Senate's consent, per U.S. Constitution article II, section 2, clause 2—an agreement exists to allow each party to "impose . . . regulations for the enforcement of police or revenue laws." *See, e.g.*, Provisional Agreement, *supra* note 94, art. IV.

100. To paraphrase what President Richard Nixon famously said during the first energy crisis, "You can [sue OPEC] but it would be wrong." Spencer Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105, 155 (2002) (citing THE PRESIDENTIAL TRANSCRIPTS 118 (Delacorte Press 1974) (Meeting: The President, John Dean and John Haldeman, Oval Office, Mar. 21, 1973, 10:12–11:55 a.m.)).

101. Dismissals for failure to state a claim are disfavored in antitrust actions. *See* Hosp. Bldg. Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 746 (1976) (noting that in antitrust cases, where proof of conspiracy often lies with the conspirators themselves, "dismissals [made] prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly").

102. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

103. FED. R. CIV. P. 8(a)(2).

104. Conley v. Gibson, 355 U.S. 41, 47 (1957) ("The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.").

105. *Twombly*, 550 U.S. at 555. This is true even if the allegations themselves are

Countries, or its affiliated companies, however, jurisdictional and prudential concerns have prevented every plaintiff from being able to state a claim upon which relief may be granted; no case has received final decision on the merits.[106] But judicial aversion to complaints against OPEC has only challenged plaintiffs to find new methods by which to rein in the cartel.[107] As plaintiffs' boldness has increased, however, so has the sweeping generality of the courts' decisions barring their recovery.[108] This section will follow the trajectory of anti-OPEC litigation strategy, beginning with early cases alleging violations by OPEC and its Member Countries, and concluding with more recent cases attacking companies affiliated with OPEC Member Countries.

1. *Early Cases Alleging Violations by OPEC and its Member Countries*

As adverse parties, OPEC and its Member Countries were thoroughly exempted from future lawsuits after three opinions were delivered in only two cases: *International Association of Machinists & Aerospace Workers ("IAM") v. OPEC*[109] *(I)* and *(II)*,

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doubtful in fact. *Id.* at 555–56 (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, n.1 (2002)).

106. "Dismissals for lack of a justiciable question are properly treated as dismissals for failure to state a claim." *In re RPP*, 649 F. Supp. 2d at 579 (quoting Hanson v. Town of Flower Mound, 679 F.2d 497, 503 n.8 (5th Cir. 1982)); *see also IAM (I)*, 477 F. Supp. at 564–70 (denying subject-matter jurisdiction); *IAM (II)*, 649 F.2d 1354, 1361 (9th Cir. 1981) (denying the suit on prudential grounds); Prewitt Enters., Inc. v. OPEC, 353 F.3d 916, 928 (11th Cir. 2003) (denying personal jurisdiction). Courts have barred suits as improper even when the judges agreed personally with the plaintiffs' claims. *See IAM (I)*, 477 F. Supp. at 575 ("The Court should not conclude this discussion without reaffirming its admiration of plaintiff and its counsel for bringing this action, a commendation already stated by the Court at trial.").

107. *See, e.g.*, *In re RPP*, 649 F. Supp. 2d at 576–77 (suing the U.S. subsidiaries of OPEC-affiliated companies for conduct in furtherance of a conspiracy).

108. *Compare IAM (I)*, 477 F. Supp. at 569 (denying jurisdiction because suit against OPEC and its member countries was barred by sovereign immunity), *with Prewitt*, 353 F.3d at 928 (denying jurisdiction because proper process against OPEC is impossible), *and In re RPP*, 649 F. Supp. 2d at 597 (rejecting the case as a nonjusticiable political question).

109. 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

and *Prewitt Enterprises, Inc. v. OPEC*.[110] In *IAM I*, the court denied subject matter jurisdiction based on foreign sovereign immunity.[111] In *IAM II*, the court ruled that, as a prudential matter, it was barred from adjudicating the case by the act of state doctrine.[112] Finally, in *Prewitt*, the court denied personal jurisdiction over OPEC, holding that service of process on OPEC was impossible.[113]

a. *IAM I*

IAM, a labor union, brought suit in 1978 against OPEC and its thirteen Member Countries for price-fixing in violation of the Clayton Act and section 1 of the Sherman Act.[114] IAM claimed damages incurred by its members for paying excessive oil and gasoline prices.[115] It argued that it was authorized to bring suit by the commercial acts exception to the Foreign Sovereign Immunities Act ("FSIA") of 1976.[116] The district court

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110. 353 F.3d 916 (11th Cir. 2003), *cert. denied*, 543 U.S. 814 (2004).

111. *IAM (I)*, 477 F. Supp. at 559.

112. *IAM (II)*, 649 F.2d at 1361.

113. *Prewitt*, 353 F.3d at 928.

114. *IAM (I)*, 477 F. Supp. at 558–59.

115. *Id.* at 559.

116. *Id.* (citing 28 U.S.C. §§ 1602, 1605(a)(2)). A foreign state—or corporation owned or controlled by a foreign government—is entitled to complete immunity from suit unless the FSIA grants an exception. 28 U.S.C. §§ 1604, 1605 (2006); *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."). According to the FSIA, U.S. courts have jurisdiction only if the foreign state has (a) waived its immunity, (b) engaged in commercial activity, (c) illegally expropriated property, (d) acquired rights to U.S. property, or (e) committed certain torts within the United States 28 U.S.C. § 1605(a)(1)–(6) (2006); *see also* INTERNATIONAL GUIDELINES, *supra* note 94, § 3.31. The commercial activity exception is the primary exception plaintiffs have claimed in suits against OPEC. *See, e.g.*, *IAM (I)*, 477 F. Supp. at 569 (denying jurisdiction because suit against OPEC and its member countries was barred by sovereign immunity). It applies to commercial activities carried on in the United States by a foreign state, or to a foreign state's commercial activities outside the United States with direct effects on U.S. commerce. 28 U.S.C. § 1605(a)(2) (2006); *see also* INTERNATIONAL GUIDELINES, *supra* note 94, § 3.31 (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)) (explaining that direct effects exist only where the effect is an "immediate consequence of the defendant's . . . activity") (ellipsis in original). Activities are commercial if the primary purpose is to earn profit; activities are sovereign if the primary purpose is to

disagreed.[117] Comparing each Member Country's decision to regulate its crude oil production to the U.S. oil regulatory regime,[118] which was certainly sovereign action,[119] the court opined that "[t]he action of sovereign nations coming together to agree on how each will perform certain sovereign acts can only, itself, be a sovereign act."[120] As sovereign action, therefore, the production decisions of OPEC and its Member Countries were not commercial in nature.[121] The commercial exception to the FSIA was thus inapplicable to IAM's case against OPEC; OPEC and its Member Countries were protected from suit by sovereign immunity.[122] U.S. courts had no subject matter jurisdiction over OPEC.[123]

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advance national policy. *See* 28 U.S.C. § 1605(a)(2) (2006). An act cannot be both sovereign and commercial. *See IAM (I)*, 477 F. Supp. at 569 & n.14. Federal courts have held that companies owned by foreign governments are protected by foreign sovereign immunity if the governmental interest in a company is for reasons other than solely earning revenue. *See* In re Investigation of World Arrangements, 13 F.R.D. 280, 291 (D.C. Cir. 1952) (extending sovereign immunity in antitrust action to company owned by British government because the government's interest in the company was for national defense purposes).

117. *IAM (I)*, 477 F. Supp. at 569.

118. Specifically, the "establishing [of] terms and conditions for removal of natural resources from [one's] territory . . . ." *Id.* at 568.

119. The court discusses the Federal Connally Hot Oil Act of 1935, codified at 15 U.S.C. § 715 (2006), which regulated domestic oil production in order to prevent waste and increase prices. *Id.* In order to gain passage, a majority in both the House and Senate had to agree on the bill, and the President had to sign the bill. *See generally* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER 256–57 (1991) (discussing the historical significance of the Hot Oil Act). Legislative and Executive debate and approval necessarily made the regulation a governmental act. *IAM (I)*, 477 F. Supp. at 568.

120. *Id.* at 569.

121. *Id.; see* 28 U.S.C. § 1605(a)(2) (distinguishing "commercial" from "sovereign" acts). Many commentators have disagreed with the court's finding. *See, e.g.*, Rueda, *supra* note 86, at 60 (2001) ("There are few activities so obviously commercial in nature as selling oil for profit."); Waller, *supra* note 100, at 111–12 (implying that the Ninth Circuit Court of Appeals decision focused on the act of state doctrine because the court believed that OPEC was involved in commercial activities).

122. *IAM (I)*, 477 F. Supp. at 569. The court further held that even if jurisdiction existed, the case would fail because foreign sovereigns are not "persons" within the meaning of the Sherman Act, and because there was no proximate causal connection between OPEC's actions and domestic price increases. *Id.* at 570–74.

123. *Id.* at 569.

b. IAM II

Upon appeal to the Ninth Circuit Court of Appeals, IAM argued that the FSIA directed courts to look at the act itself, and ignore the sovereign intent behind the act.[124] The court averred that the sovereign intent of the Member Countries could not be separated from their dependence on oil revenues.[125] Because of this symbiosis, the court decided that OPEC Member Countries' production decisions were protected by the act of state doctrine.[126] When the doctrine applies, "judicial remedy is inappropriate regardless of whether jurisdiction exists."[127] Unlike foreign sovereign immunity, therefore, it is not limited by a commercial activity exception.[128] The court thus affirmed the district court's decision, though on different grounds, without ever considering the merits of the case.

c. Prewitt

In 2001, Prewitt Enterprises, Inc. ("Prewitt"), an Alabama gas station owner, sued OPEC for price-fixing in violation of section one of the Sherman Act.[129] Prewitt sought injunctive relief under section twenty-six of the Clayton Act, arguing that OPEC's decisions on price and production increased domestic gasoline prices and reduced Prewitt's profits.[130] It attempted service on OPEC by sending a copy of the complaint—international registered mail, return receipt requested—to OPEC's Vienna, Austria headquarters.[131] OPEC thereafter filed

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124. *IAM (II)*, 649 F.2d at 1358. Antonin Scalia, now a Justice on the Supreme Court, was OPEC's counsel. *Id.* at 1355.

125. *Id.* at 1358, 1360 ("When the state *qua state* acts in the public interest, its sovereignty is asserted.").

126. *Id.* at 1358.

127. *Id.* at 1361–62.

128. *Id.* at 1360.

129. *Prewitt Enters.*, 353 F.3d at 919.

130. *Id.* at 918–19.

131. *Id.* at 919. At first, OPEC failed to appear; a default judgment was entered against OPEC, and OPEC was enjoined from agreeing to allocate production for twelve months. *Id.* at 920. After the default judgment, OPEC made a special appearance to set aside the verdict and to file a motion to dismiss the complaint. *Id.* The court set aside the verdict and granted the motion to dismiss. *See infra* notes 132–133 and accompanying text.

a motion to dismiss the complaint for insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b)(5).[132] The district court granted the motion, finding that OPEC cannot be effectively served with process by registered mail in Austria because Austrian law disallows service unless the receiver has given consent to be served.[133] Furthermore, as explained in the U.S. Court of Appeals for the Eleventh Circuit's affirmation of the decision, Austrian law applies to every method of service in the country such that OPEC, which refused to consent expressly to service, cannot possibly be served process while in residence in Austria.[134] Under current law, therefore, no U.S. court can obtain personal jurisdiction over OPEC.[135]

2. *Recent Cases Alleging Violations by OPEC-Affiliated Companies*

After courts thoroughly rejected jurisdiction over cases involving OPEC and its Member Countries for violations of U.S. antitrust law, private plaintiffs set their sights on Member Country-affiliated companies that were engaged in commercial activities within the United States.[136] The cases were

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132. *Prewitt*, 353 F.3d at 920. Federal Rule of Civil Procedure 12(b)(5) allows for the defense of insufficiency of service or process to be made at any time, by motion.

133. *Prewitt*, 353 F.3d at 92, 924 (finding that Rule 4(f)(C)(ii), despite allowing for international service by registered mail, was inapplicable because Austrian law prohibited it).

134. *Id.* at 928. The court went so far as to declare that to allow service on OPEC under current Austrian law "would constitute a clear abuse of discretion." *Id.* at 928 n.21.

135. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (holding that no court may obtain personal jurisdiction over a civil defendant unless the defendant had minimum contacts in the court's territorial jurisdiction); *see also IAM (I)*, 477 F. Supp. at 569 (noting that U.S. courts have neither subject matter nor personal jurisdiction over OPEC).

136. *See In re RPP*, 649 F. Supp. 2d at 575 (consolidating S-Mart Petroleum, Inc. v. Petroleos de Venezuela, S.A., No. 1:07–1179 (D.D.C); Fast Break Foods, LLC v. Saudi Arabian Oil Co., No. 1:06–6594 (N.D. Ill.); Green Oil Co. v. Saudi Arabian Oil Co., No. 1:07–3617 (N.D. Ill.); Countrywide Petroleum Co. v. Petroleos de Venezuela, S.A., No. 1:07–1632 (N.D. Ohio); Spectrum Stores, Inc. v. Citgo Petroleum Corp., No. 4:06–3569 (S.D. Tex.); Cent. Ohio Energy, Inc. v. Saudi Arabian Oil Co., No. 1:07–6462 (N.D. Ill.)). All of these cases asserted a claim against the defendants for violating section 1 of the Sherman Act. *Id.*

consolidated in December 2007 for purposes of pretrial proceedings because they shared factual questions and defendants.[137] The consolidated case alleged that the companies' affiliations with Member Countries amounted to agreements to participate in "OPEC's price-fixing conspiracy to sell oil-based products at anticompetitive prices in the [United States]"[138] The plaintiffs hoped to enjoin the affiliated companies' U.S. subsidiaries from doing business with the Member Countries as long as they continued to participate in OPEC.[139]

The defendant companies filed a motion to dismiss, averring they were entitled to dismissal by Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction[140] because the claims raised non-justiciable political questions, and by Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim[141] because the claims raised were precluded by the act of state doctrine.[142] The court denied the Rule 12(b)(1) motion because invocation of the political question doctrine implicates a district court's jurisdiction.[143] The court granted the Rule 12(b)(6) motion, however, writing that the only alleged conduct in violation of the Sherman Act were agreements between the

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137. *Id.* (citing Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425, 435–36 (2001)).

138. *Id.* at 576.

139. *Id.* at 577.

140. *Id.* A Rule 12(b)(1) motion is successful if the court lacks statutory or constitutional authority to adjudicate a case. *See* Homebuilders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006, 1010 (5th Cir. 1998) (writing that the burden is on the party asserting jurisdiction).

141. *In re RPP*, 649 F. Supp. 2d at 577. A Rule 12(b)(6) motion is successful if the plaintiff is unable to factually show that she was injured and that she is entitled to relief. *See* Norris v. Hearst Trust, 500 F.3d 454, 461 n.9 (5th Cir. 2007) (holding that the court cannot rely on conclusory legal allegations, although it can rely on matters of public record if specific facts are not alleged).

142. *In re RPP*, 649 F. Supp. 2d at 577. The defendants also alleged the plaintiffs failed to state a claim because they were precluded by the international comity doctrine, the independent purchaser doctrine, and the Noerr-Pennington doctrine. *Id.* The court did not reach the merits of these additional doctrines and they are not important to this paper; therefore, I will not discuss them.

143. *Id.* at 577–78. Moreover, "dismissals for lack of a justiciable question are properly treated as dismissals for failure to state a claim." *Id.* at 579 (citing Baker v. Carr, 369 U.S. 186, 196 (1962)).

Member Countries to voluntary production cuts, which were sovereign decisions protected by the act of state doctrine.[144] To rule on the legality of those decisions would force the court to express disrespect for the coordinate branches of government, who have longstanding traditions of intergovernmental negotiation and treaty on issues relating to crude oil production.[145] The plaintiffs' claims thus raised nonjusticiable political questions, the merits of which the court was constitutionally prohibited from reaching.[146] Under current law, therefore, even the U.S. subsidiaries of Member Country-affiliated companies were protected against U.S. antitrust laws for OPEC-mandated production decisions.

III. AS SOME WANT THINGS TO STAND

Legislators, unhappy with the judicial aversion to claims against OPEC, its Member Countries, and its affiliated companies, have introduced several bills aimed at bringing the cartel and its associates within the jurisdiction of the courts.[147] This section looks at the several angles from which these bills attempt to attack the problem: from forcing the President to enter into international diplomatic negotiations with an eye toward terminating OPEC's price-fixing arrangements,[148] to

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144. *Id.* at 595–96, 598–99. In agreeing to production quotas promulgated by their Member Country affiliates, the defendants were merely following the law of the states in which they operated. They had no more say over production levels than do U.S. companies over whether to drill in the Arctic National Wildlife Reserve ("ANWR"). *See* Alex Kingsbury, *Lisa Murkowski Will Focus on Arctic Oil Drilling*, U.S. NEWS & WORLD REPORT, Mar. 31, 2009, http://www.usnews.com/articles/news/energy/2009/03/31/lisa-murkowski-will-focus-on-arctic-oil-drilling.html (describing Alaskan Senator Lisa Murkowski's continued efforts to get Congress to open up the ANWR to private drilling).

145. *In re RPP*, 649 F. Supp. 2d at 598.

146. *Id.* at 597–98 (discussing the six factors indicating the presence of a nonjusticiable political question, identified by the Court in Baker v. Carr, 369 U.S. 186, 210–11 (1962)); *see also* U.S. CONST. art. III, § 2, cl. 1 (extending judicial power to cases arising under the laws of the United States).

147. *See* Udin, *supra* note 13, at 1366–70 ("While not taking any official action, Congress has duly recognized OPEC's reprehensible conduct and has begun efforts to cope with the serious problems resulting from the rise in the price of oil stemming from the activities of OPEC and its member countries.").

148. Oil Price Reduction Act of 2000, H.R. 3822, 106th Cong. § 3(b) (2000). Interesting to note, U.S. Representative Benjamin Gilman (R-NY), one-time Chairman of

prohibiting courts from using the act of state doctrine to decline cases that involve OPEC,[149] to preventing the President from offering financial assistance to countries that support OPEC,[150] and, finally, to amending the Sherman Act to apply to OPEC Member Countries and to thus deny them any defense for decisions on oil prices.[151]

A. *Oil Price Reduction Act of 2000 ("OPRA")*

In March 2000, the House passed a bill that would have forced the President to re-evaluate the economic and security relationship between the United States and each of the OPEC Member Countries.[152] If any of the Member Countries were determined by the President to be engaged in price-fixing activities, OPRA would force the President to enter into negotiations with U.S. allies in order to "reduce, suspend, or terminate bilateral assistance and arms exports" to those countries.[153] The idea behind OPRA was that U.S. assistance and arms exports to Member Countries would be predicated upon "complete dismantlement of international oil price fixing arrangements."[154] Upon receiving the bill from the House, the Senate referred it to the Senate Committee on Foreign Relations, where it died.[155]

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the House International Relations Committee, introduced the Oil Price Reduction Act of 2000 (OPRA), Foreign Trust Busting Act (FTBA), and International Energy Fair Pricing Act of 2000 (IEFPA), in an impotent attempt to bring OPEC within U.S. antitrust laws by any means possible. *See* Udin, *supra* note 13, at 1367–69 (discussing Rep. Gilman's string of un-passed anti-OPEC bills).

149. Foreign Trust Busting Act, H.R. 4731, 106th Cong. (2000).

150. International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. (2000).

151. Gas Price Relief for Consumers Act of 2008, H.R. 6074, 110th Cong. (2008). This bill is also known as the "No Oil Producing and Exporting Cartels Act of 2008," or "NOPEC." *Id.*

152. H.R. 3822, 106th Cong., §§ 4–6 (2000). OPRA was intended to tie the President's hands with regard to foreign policy by requiring him to "undertake a concerted bilateral and multilateral diplomatic campaign to bring about the termination of oil price-fixing arrangements," whether involving OPEC members or other major non-OPEC members. *See* Udin, *supra* note 25, at 1368–69.

153. H.R. 3822, 106th Cong. § 6(a) (2000).

154. *Id.* § 3(b).

155. *See* THE LIBRARY OF CONGRESS: THOMAS, H.R. 3822, http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR03822:@@@L&summ2=m& (last visited Feb. 5, 2010)

B. Foreign Trust Busting Act ("FTBA")

If passed, the FTBA, which was introduced in the House in June 2000, would have amended certain provisions in the Foreign Assistance Act of 1961.[156] The provisions state that U.S. courts cannot apply the act of state doctrine to decline hearing cases that allege unlawful takings of property by a foreign sovereign.[157] The FTBA hoped to extend denial of the act of state doctrine to cases alleging antitrust violations by OPEC.[158] In the end, however, the bill, which had no co-sponsors, was killed in committee.[159]

C. International Energy Fair Pricing Act of 2000 ("IEFPA")

IEFPA, similar to OPRA, attempted to force the President to re-evaluate economic and security ties with each of the Member Countries.[160] It was introduced in the House in June 2000 after OPRA failed to come to a vote in the Senate.[161] The IEFPA would have forced the President to cut off all foreign assistance to OPEC Member Countries and to any country that supported

(providing OPRA's status in Congress). The Senate prevented OPRA from becoming a law by failing to vote on it before they adjourned the session. *See* U.S. CONST. art. I, § 7 (noting that the House and the Senate must vote on a bill before it becomes a law, and that if Congress adjourns, any pending bills will not become law).

156. Pub. L. No. 87–195, 75 Stat. 424 (codified at 22 U.S.C. § 2370(e)(2) (2006)).

157. Foreign Trust Busting Act, H.R. 4731, 106th Cong. § 4 (2000).

158. 147 Cong. Rec. E1107–01 (daily ed. June 23, 2000) (extension of remarks of Rep. Gilman) (alleging that OPEC "blatantly manipulates the price of oil" and questioning "why [no] legal pressure [is] brought to bear on the members of OPEC.").

159. *See* THE LIBRARY OF CONGRESS: THOMAS, H.R. 4731, http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR04731:@@@L&summ2=m& (last visited Feb. 5, 2010) (providing FTBA's status in Congress).

160. International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. § 2 (2000).

161. *Compare id.* (noting the bill was introduced by Rep. Gilman on June 23, 2000), *with* THE LIBRARY OF CONGRESS: THOMAS, H.R. 3822, *supra* note 155. (stating that OPRA died in the Senate). If the Senate did not hold a vote by July 27, 2000, the bill would have died. *See* U.S. CONST. art. 1, § 7, cl. 2–3 (explaining the constitutional limitations to a bill's lifespan within Congress); THE LIBRARY OF CONGRESS: THOMAS, Days in Session Calendars: 106th Congress 2d Session, http://thomas.loc.gov/home/ds/h1062.html (last visited Feb. 5, 2010) (showing that the 106th Congress adjourned on July 27th).

the Member Countries.[162] The House was less friendly to this provision than it was to OPRA, however; IEFPA only secured one co-sponsor and failed to get out of committee.[163]

D. The NOPEC Bill ("NOPEC")

The No Oil Producing and Exporting Cartels Act bill has been introduced in Congress—in one form or another—a total of sixteen times between 1999 and 2009.[164] The bill passed the House in 2008.[165] It has never come to a vote in the Senate, although it was on the 2009 calendar.[166] Essentially, the NOPEC bill attempts to accomplish what OPRA, FTBA, and IEFPA failed to do: it amends the Sherman Act to cover price decisions by OPEC Member Countries, denies application of the act of state doctrine or sovereign immunity to cases alleging antitrust violations by OPEC or its Member Countries, and

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162. International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. (2000).

163. *Compare* THE LIBRARY OF CONGRESS: THOMAS, H.R. 4732, http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR04732:@@@L&summ2=m& (last visited Feb. 5, 2010) (providing IEFPA's status in Congress), *with* THE LIBRARY OF CONGRESS: THOMAS, H.R. 3822, *supra* note 155 (showing OPRA had fifty-two co-sponsors and was passed by the House).

164. *See* No Oil Producing and Exporting Cartels Act of 2009, S. 204, 111th Cong. (2009); No Oil Producing and Exporting Cartels Act of 2007, S. 879, 110th Cong. (2007); No Oil Producing and Exporting Cartels Act of 2008, S. 2991, 110th Cong. § 401 (2008); No Oil Producing and Exporting Cartels Act of 2008, S. 3044, 110th Cong. § 401 (2008); No Oil Producing and Exporting Cartels Act of 2008, H.R. 2264, 110th Cong. (2007); No Oil Producing and Exporting Cartels Act of 2007, H.R. 2950, 110th Cong. § 701 (2007); No Oil Producing and Exporting Cartels Act of 2008, H.R. 6074, 110th Cong. § 101 (2008); No Oil Producing and Exporting Cartels Act of 2008, H.R. 6653, 110th Cong. § 301 (2008); No Oil Producing and Exporting Cartels Act of 2007, S. 555, 109th Cong. (2007); No Oil Producing and Exporting Act of 2006, S. 2557, 109th Cong. § 6 (2006); No Oil Producing and Exporting Cartels Act of 2005, H.R. 695, 109th Cong. (2005); No Oil Producing and Exporting Cartels Act of 2006, H.R. 5279, 109th Cong. (2006); No Oil Producing and Exporting Cartels Act of 2004, S. 2270, 108th Cong. (2004); No Oil Producing and Exporting Cartels Act of 2004, H.R. 4106, 108th Cong. (2004); No Oil Producing and Exporting Cartels Act of 2001, S. 665, 107th Cong. (2001); No Oil Producing and Exporting Cartels Act of 2000, S. 2778, 106th Cong. (2000); No Oil Producing and Exporting Cartels Act of 2000, H.R. 5241, 106th Cong. (2000).

165. No Oil Producing and Exporting Cartels Act of 2008, H.R. 2264, 110th Cong. (2008) (passed May 22, 2007); No Oil Producing and Exporting Cartels Act of 2008, H.R. 6074, 110th Cong. (2008) (passed May 20, 2008).

166. No Oil Producing and Exporting Cartels Act of 2009, S. 204, 111th Cong. (2009) (introduced Jan. 12, 2009).

amends the Foreign Sovereign Immunities Act to create an additional exception to the FSIA's protection for antitrust actions brought against OPEC Member Countries.[167] It creates jurisdiction over all actions by a defendant that have a "direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States."[168] Unlike the earlier proposed bills, which tried to directly restrain the coordinate branches' discretion over dealings with OPEC and its affiliates, NOPEC attempts to alter the statutory law upon which all previous executive and judicial decisions were based.[169]

IV. AS THINGS WILL LIKELY CONTINUE TO STAND

The NOPEC bill—should the Senate accept it and should the President sign it[170]—appears poised to bring OPEC Member Countries to their knees.[171] It provides U.S. courts with extraterritorial jurisdiction over OPEC-related conduct and it prohibits U.S. courts from using the act of state doctrine or sovereign immunity to reject anti-OPEC claims.[172] But the NOPEC bill's ability to deliver on its promises may have been

167. *Compare* No Oil Producing and Exporting Cartels Act of 2009, S. 204, 111th Cong. (2009), *with supra* notes 152–163 and accompanying text (discussing OPRA, FTBA, and IEFPA bills).

168. S. 204, 111th Cong. § 7A(a)(3) (2009).

169. *See supra* note 167.

170. Both situations appear close to impossible. *See infra* notes 256–268 and accompanying text (illustrating the political, economic, environmental, and security quagmire into which the NOPEC bill would lead the United States); *see also* Richard Simon, *U.S. House Votes to Allow Lawsuit Against OPEC*, L.A. TIMES, May 21, 2008, at A15.

171. *See supra* notes 164–169 and accompanying text (discussing the NOPEC bill). Because U.S. courts cannot achieve personal jurisdiction over OPEC under existing Austrian law, plaintiffs can only go after Member Countries and their affiliated companies. *See* Prewitt Enters., Inc. v. OPEC, 353 F.3d 916, 927–28 (11th Cir. 2003) (holding that OPEC cannot be served process in Austria); *see also supra* notes 129–135 and accompanying text (discussing *Prewitt*'s holding). One wonders why each of the Member Countries has not passed similar rules regulating the service of foreign process in their countries.

172. No Oil Producing and Exporting Cartels Act of 2009, S. 204, 111th Cong. (2009).

oversold.[173]

The Supreme Court—especially under Chief Justice John Roberts's watchful eye[174]—is unlikely to allow recovery against OPEC if it disagrees with the text or thrust of the legislation.[175] Justice Scalia's dissent in *Hartford Fire Ins. Co. v. California*—which was joined by Justices O'Connor, Kennedy, and Thomas—is instructive with regard to the current Court's likely interpretation of the NOPEC bill: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[176] Justice Holmes would have

173. *See* Kenneth S. Reinker, *NOPEC: The No Oil Producing and Exporting Cartels Act of 2004*, 42 HARV. J. ON LEGIS. 285, 297 (2005) (predicting that the NOPEC bill will "increase litigation costs, potentially embroil the courts in foreign policy, and create difficult sovereign immunity questions that could be avoided by not applying antitrust law abroad.").

174. In the Roberts worldview, however, taking anything but a literal approach to statutory language is incorrect. *See* Responses of Judge John G. Roberts, Jr. to the Written Questions of Senator Edward M. Kennedy, at 32 (Sept. 5, 2005) (on file with WASH. POST), *available at* http://www.washingtonpost.com/wpsrv/nation/documents/roberts/kennedy_responses.pdf [hereinafter Responses of Roberts] ("The proper role for the court is to enforce [statutes] as the framers wrote [them].").

175. *See generally* Scott Looper, *Reading Roberts: A Critical Framework for Analyzing the Supreme Court's Decision in* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 46 HOUS. L. REV. 101, 177 (2009) (commenting on the Roberts Court's aversion to and willingness to overrule or severely limit the applicability of case law or statutes that it believes are inappropriate to the Constitution). Additionally, Justice Antonin Scalia, who represented OPEC in the *IAM* case, has expressed displeasure with any attempt to apply U.S. law to foreign states in their sovereign acts. *Hartford Fire*, 509 U.S. at 796 n.23 (Scalia, J., with whom O'Connor, Thomas, and Kennedy, JJ., join, dissenting). If Justices Scalia, Thomas, and Kennedy convince Justice Alito and Chief Justice Roberts to join their side—a likely result considering the Court's opinions in recent antitrust cases Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007), and *Twombly*, 550 U.S. 544, in which the Court has increased the difficulty of bringing a successful antitrust case before it—the NOPEC bill may have a very short shelf-life, indeed. *See* Looper, *supra*, at 138 ("Eschewing the Supreme Court's most established principle—that interpretation of the law does not disrespect the coordinate branches—the Roberts Court's formalist separation of powers decision in *Leegin* jerked so tight the belt upholding the Supreme Court's jurisdiction it threatens society with '[t]he specter of the Federal Government brought to a halt.'").

176. *Hartford Fire*, 509 U.S. at 814–15 (Scalia, J., dissenting) (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.)). One commentator noted that if this rule were adopted by the Court, it would take the Sherman Act back in the direction of *American Banana* and away from punishing overseas restraints by foreigners on U.S. export activities. Baker & Miller, *supra* note 78,

agreed.[177] "The controlling considerations" in this analysis are "the interacting interests of the United States and of foreign countries."[178] According to three members of the current Court, therefore, NOPEC should be narrowly construed so as not to regulate foreign conduct if such regulation violates international law.[179] If Justice Scalia convinces two other justices to join his side,[180] claims brought under the NOPEC bill will be subject to *American Banana*'s jurisdictional principles.[181]

This part applies Justices Holmes's and Scalia's statutory construction principle[182] to two questions that must be answered before NOPEC claims may be judged on their merits. First, do cases brought under NOPEC state a claim upon which relief may be granted? If so, does NOPEC present any political questions such that courts should refrain from adjudicating cases brought under it? Answers to these questions will guide future litigation decisions.

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at 91. This concept lines up directly with Justice Holmes's jurisdiction principle. *See supra* notes 72–75 and accompanying text (discussing *American Banana*'s jurisdictional principle).

177. Justice Holmes wrote that "[t]he foregoing considerations would lead . . . to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *Am. Banana*, 213 U.S. 247, 357.

178. *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting) (citing Romero v. Int'l Terminal Op. Co., 358 U.S. 354, 383 (1959)).

179. NOPEC violates the law of each of the Member Countries. Served Defs.' Mot. Dismiss at 16, *In re RPP*, 649 F. Supp. 2d 572 (S.D. Tex. 2009) (Nos. H:07-MDL-01886, H:06-CV-03569, H:07-CV-0449, H:07-CV-04413, H:07-CV-04415, H:08-CV-00241, H:08-CV-02745).

180. Chief Justice Roberts is likely in the bag; Justice Kennedy should follow shortly thereafter. *See* Looper, *supra* note 175, at 178, 197 (remarking on Chief Justice Roberts's preference for narrow, textual decisions and on his ability to persuade Justice Kennedy).

181. *See supra* notes 72–79 and accompanying text (discussing *American Banana*'s jurisdictional principle). Justice Holmes argued that statutes should be narrowly construed so as not to interfere with conduct under the jurisdiction of foreign sovereigns. *Am. Banana*, 213 U.S. at 357.

182. *Compare supra* note 176 *with supra* note 177.

A. Do Cases Brought Under OPEC State a Claim upon which Relief may be Granted?

The NOPEC bill entitles a plaintiff to relief if the plaintiff's claim shows that OPEC's conduct has a "direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States."[183] This language—requiring a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce—mirrors the proximate causation standard for measuring injury required by the FTAIA.[184] The FTAIA's standard departs from the common law "effects test" developed in *Alcoa*,[185] and declared as well-established in *Hartford Fire*,[186] which requires a plaintiff to show that, but for the foreign conduct, U.S. domestic commerce would not have been affected.[187] A plaintiff pleading a claim under NOPEC, as under

183. *See NOPEC*, S. 204, 111th Cong. § 2 (2009) (containing the standard for recovery); *Twombly*, 550 U.S. at 554–55 (holding that a plaintiff must state "a short and plain statement of the claim showing that the pleader is entitled to relief"); *see also supra* notes 101–105 and accompanying text (discussing the pleading standard for antitrust cases).

184. *Compare NOPEC*, S. 204, 111th Cong. § 2 (2009) (requiring a "direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States"), *with* 15 U.S.C. § 6a (2000) (requiring a "direct, substantial, and reasonably foreseeable effect" on the U.S. market). *See supra* note 78 (discussing the FTAIA).

185. *See* United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 444 (2d Cir. 1945) (ruling that the Sherman Act reaches foreign conduct that was intended to affect—and that did affect—U.S. commerce). One commentator noted the difference lies where "the FTAIA enacted an objective version of the intent requirement from *Alcoa*." Huffman, *supra* note 78, at 316. *Alcoa*'s test was a much broader "intended effects" test. *Id.* at 316 n. 173.

186. *Hartford Fire*, 509 U.S. at 796. There was a question as to whether the FTAIA "amend[ed] existing law or merely codifie[d] it," but the Supreme Court has not addressed the issue. *Id.* at 796 n. 23. Apparently, the FTAIA amended existing law. *See infra* note 187 (distinguishing the FTAIA from the effects test).

187. *See supra* note 78 (distinguishing the effects test from the FTAIA). *Compare* F. Hoffman-LaRoche, Ltd. v. Empagran, 542 U.S. 155, 164 (2004) (noting that "direct" requires proximate causation), *with Hartford Fire*, 509 U.S. at 796 n.23 (implying that the effects test requires a but-for "nexus"), *and* Empagran v. F. Hoffman-LaRoche, Ltd., 417 F.3d 1267, 1270–71 (D.C. Cir. 2005) (distinguishing the "direct" requirement of proximate causation from the effects test's but-for "nexus" requirement). *But see* Huffman, *supra* note 78, at 313 ("The FTAIA codified a version of the *Alcoa* effects test."). This language, when combined with the NOPEC bill's proclamation of personal

the FTAIA, must show that the anticompetitive effect she suffered in the U.S market—increased oil prices—was an immediate consequence[188] of the wrongful conduct[189] of OPEC Member Countries or their affiliated companies.[190] Only then can a court hear the case.[191]

Unfortunately for plaintiffs, courts have acknowledged several barriers that stand in the way of a pleader's ability to show proximate causation[192] between OPEC's decisions and higher domestic oil prices. First, support for OPEC's conduct by U.S subsidiaries of Member Country-affiliated companies is not by itself wrongful under NOPEC.[193] Second, spillover effects in the domestic market, caused by OPEC decisions targeting foreign markets, are neither "direct" nor "substantial" enough to

jurisdiction over "any instrumentality or agent of any other foreign state," appears to apply also to U.S. subsidiaries of OPEC-affiliated companies involved in importing to the U.S. subsidiaries that would otherwise be subject only to the Sherman Act's but-for test. *See NOPEC*, S. 204, 111th Cong., § 2 (2009).

188. "A direct effect might occur if the conduct prevented immediate competition in the U.S. market . . . ." Huffman, *supra* note 78, at 316. *But see* United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004) (encompassing a different scenario).

189. Wrongful conduct, as defined by the NOPEC bill, includes collusive acts between foreign states or their agents or instrumentalities "(1) to limit the production or distribution of oil, natural gas, or any other petroleum product; (2) to set or maintain the price of oil, natural gas, or any petroleum product; or (3) to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product." *NOPEC*, S. 204, 111th Cong. § 2 (2009).

190. *See* Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842, 862 (D.N.J. 2008) (stating that a "direct effect" requires "a causal link between the *wrongful conduct* and the *anticompetitive effect* suffered in the United States" (citing *LSL Biotechnologies*, 379 F.3d at 680)).

191. *See Twombly*, 550 U.S. at 554–55 (noting that a plaintiff must state "a short and plain statement of the claim showing that the pleader is entitled to relief"); *see also supra* note 183 and accompanying text (discussing the NOPEC bill's pleading standard).

192. *See Animal Science*, 596 F. Supp. 2d at 862–63 (outlining court cases that held proximate causation requires a direct and intended link between wrongful conduct and anticompetitive effect (citations omitted)). And if a pleader fails to make factual allegations heavier than mere speculation or recitation of the elements of the charge, the court is obliged to dismiss for failure to state a claim. *Twombly*, 550 U.S. at 555–56.

193. *See Animal Science*, 596 F. Supp. 2d at 862 ("The courts agree that participation by American firms in the alleged conspiracy does not, by itself, establish an anticompetitive effect in the United States." (citing Kruman v. Christie's Int'l PLC, 284 F.3d 384, 395 (2d Cir. 2002))).

satisfy the standard's requirements.[194] If a plaintiff is unable to rely on wrongful conduct other than subsidiary support, or is unable to establish anticompetitive harm other than from spillover effects, she is unlikely to state a claim upon which relief may be granted.

1. OPEC Support from U.S. Subsidiaries is Not Wrongful Under NOPEC

The NOPEC bill's amendment to the Sherman Act requires collusion between foreign states or their agents or instrumentalities.[195] No one denies that OPEC Member Countries agree amongst themselves to limit production.[196] But no one has been able to characterize as collusion a U.S. subsidiary's support for its affiliated Member Country.[197] In a recent case that denied jurisdiction over the U.S. subsidiaries ("Subsidiaries") of Member Country-affiliated companies, District Judge Simeon Lake wrote that the subsidiaries' acts allegedly in furtherance of the conspiracy to fix prices in the U.S.—purchasing crude oil in Member Countries' territory, providing technical information to OPEC about U.S. markets, and allowing executives to participate in OPEC meetings—"neither caused the foreign sovereign members of the conspiracy to limit their production of crude oil, nor caused the price-fixing of [refined petroleum products] in the United States."[198]

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194. *See id.* (referring to the FTAIA's standard (citing Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 2d 1102, 1106–07 (S.D.N.Y. 1984); Turicentro, S.A. v. Am. Airlines, Inc., 303 F.3d 293, 304 (3d Cir. 2002))); Dee-K Enters., Inc. v. Heveafil Sdn. Bhd, 299 F.3d 281, 294 (4th Cir. 2002) (noting that "a court should consider whether the defendant's acts, targets, and effects are primarily foreign or primarily domestic").

195. *NOPEC*, S. 204, 111th Cong. § 2 (2009).

196. *See supra* notes 34–39 and accompanying text (describing OPEC's effect on global oil prices).

197. *See, e.g.*, *In re RPP*, 649 F. Supp. 2d 572, 591 (S.D. Tex. 2009). In fact, "[i]t is axiomatic that a business entity cannot conspire with its wholly owned subsidiary for purposes of the Sherman Act liability." *Animal Science*, 596 F. Supp. 2d at 866 (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984)). In order to prove a violation, a plaintiff would have to show that the subsidiary conspired with someone other than its parent company. *Id.*

198. *In re RPP*, 649 F. Supp. 2d at 588. Judge Lake continued: "Decisions of foreign sovereigns about production levels of natural resources produced within their territorial boundaries—including crude oil—are sovereign acts regardless of whether the decisions

Characterizing the Subsidiaries' direct participation in OPEC meetings as "support" activities, Judge Lake wrote that no one had established that the Subsidiaries were anything but "purchaser[s] of crude oil produced by a foreign sovereign state at prices set by the foreign sovereign producer."[199] The Subsidiaries' conduct, therefore, was not in combination with other foreign states;[200] it is not wrongful according to NOPEC,[201] and it raises no concerns for the DOJ.[202] In line with this ruling, an antitrust case brought under the NOPEC bill will likely fail to state a claim because a pleader cannot show the Subsidiary engaged in wrongful conduct.[203]

2. *Spillover Effects of Conduct Targeted at Foreign Markets Does Not Establish Anticompetitive Harm Under NOPEC*

Anticompetitive harm as defined by NOPEC must have been proximately caused by the wrongful conduct of Member

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are products of unilateral deliberation or consultation with others." *Id.* (citing *IAM (I)*, 477 F. Supp. at 569), in applying the act of state doctrine). In this case, the pleader claimed that a subsidiary, Citgo, "itself joined with members of OPEC as a willing participant in the price-fixing conspiracy" to "facilitate, enable, and provide direct assistance to the cartel's price-fixing scheme." *Id.* at 584 (quoting Spectrum Complaint, at 2). Judge Lake wrote that this complaint showed only that Citgo's actions were in support of—and not in combination with—the conspiracy because the complaint did not allege that Citgo produces oil. *Id.* at 585. He adds, however, that even if the complaint alleged that Citgo produces oil, the crux of the conspiracy was Citgo's agreement with its affiliated Member Country, Venezuela, to reduce production of oil—and not Citgo's agreement with other Member Countries or their agents or instrumentalities. *Id.*

199. *Id.* at 587. If anything, the U.S. subsidiaries were simply following resale price maintenance agreements, which the Supreme Court recently held exhibit several precompetitive effects. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (1997) (finding that vertical price fixing is not per se prohibited by the Sherman Act).

200. This was true even though the plaintiff claimed that the U.S. subsidiaries were 100% owned by national oil companies, whose executives were also their affiliated Member Countries' oil ministers, thus parties to production-cutting agreements made in OPEC. *See In re RPP*, 649 F. Supp. 2d at 585.

201. *See supra* notes 189, 195 (listing the NOPEC bill's definitions of wrongful conduct).

202. *See supra* notes 96–98 and accompanying text (discussing DOJs granting of exceptions to the Sherman Act).

203. *See supra* notes 188–191 and accompanying text (declaring the pleading standard under NOPEC).

Countries or their foreign affiliated companies[204] in order to be "direct" and "substantial."[205] In a recent case that denied jurisdiction over sixteen Chinese state-owned companies accused of engaging in a price-fixing cartel, District Judge Garrett Brown defined the threshold for showing proximate causation of direct and substantial anticompetitive harm by foreign companies.[206] Judge Brown—presuming that the cartel's acts lacked sovereign action[207]—focused on "whether the defendants' *acts*, *targets*, and *effects* are *primarily* foreign or *primarily* domestic."[208] He concluded that the claim[209]—even if the

204. As discussed in the subsection above, U.S. subsidiaries of Member Country-affiliated companies do not engage in wrongful conduct. *See supra* note 195–203 and accompanying text (discussing the inapplicability of the NOPEC bill to U.S. subsidiaries of Member Country-affiliated companies). OPEC, itself, cannot be sued because U.S. courts cannot obtain personal jurisdiction as long as OPEC remains in residence in Austria. *See* Prewitt Enters., Inc. v. OPEC, 353 F.3d 916, 927–28 (11th Cir. 2003) (holding that OPEC cannot be served process in Austria); *supra* notes 129–135 (repeating *Prewitt*'s holding). Any anticompetitive acts must therefore have been performed by the Member Countries or their affiliated companies.

205. *See supra* notes 188–91 and accompanying text (declaring the pleading standard under NOPEC).

206. Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842, 862–63 (D.N.J. 2008). The court applied the FTAIA, whose test for anticompetitive effect duplicates the test in the NOPEC's amendment to the Sherman Act. *See supra* notes 183–91 (comparing the tests in NOPEC and the FTAIA). A U.S. company that manufactured animal feed brought the case against the Chinese companies for colluding to limit production of and to set prices for processed magnesite—a main ingredient in animal feed—which was sold in the United States and throughout the world by the defendants and their affiliates. *Animal Science*, 596 F. Supp. 2d at 852–53. The complaint alleged that the Chinese companies engaged in a cartel to limit production, which resulted in a 50% price increase even though global demand was shrinking. *Id.* at 853. Additionally, because the defendants did not sell directly to the U.S. but sold to the U.S. only through their affiliates, the defendants had no minimum contacts with the U.S. sufficient to warrant jurisdiction. *Id.* at 876–77.

207. *Id.* at 868. "The Court, therefore, presumes—*for the purposes of this discussion only*—that all Defendants named in this matter are enjoying such juridical status and/or operational regime that Plaintiffs' allegations stated in the Complaint *cannot* be qualified as implicating either the act-of-state or foreign sovereign compulsion . . . or as bringing into this discussion any other provision, judicially-created doctrine or public policy related to a foreign sovereign's action." *Id*. Judge Brown presumed such even though he was unsure whether the companies were 100% Chinese state-owned companies. *Id.*

208. *Animal Science*, 596 F. Supp. 2d at 865 (citing Dee-K Enters., Inc. v. Heveafil Sdn. Bhd, 299 F.3d 281, 294 (4th Cir. 2002). He applied a test created for *Dee-K*, an

plaintiffs had showed horizontal price fixing—failed to establish that the Chinese companies' acts caused "direct, substantial, and reasonably foreseeable effect" on U.S. commerce because (1) the collusive agreements were made entirely outside U.S. jurisdiction, (2) the target of the cartel's conduct was a global market, without any specific focus on the U.S. market, and (3) effects in the U.S. market were minor compared to effects worldwide.[210]

If plaintiffs brought suit against Member Countries or their affiliated companies for limiting production and fixing price in violation of the NOPEC bill, the *Animal Science* holding should instruct the court to dismiss the case for failure to state a claim. The plaintiff's challenge—one with which litigators are surely waiting to experiment[211]—is to show that the defendant's wrongful conduct proximately caused a "direct, substantial, and reasonably foreseeable" effect on domestic oil markets.[212] Assuming a plaintiff could show wrongful conduct, the defendants would be unable to have their case dismissed simply by characterizing their acts as sovereign.[213] But the only real

earlier foreign antitrust case. *Animal Science*, 596 F. Supp. 2d at 865.

209. *See id.* at 870 (noting that the claim contained merely "labels and conclusions [or] a formulaic recitation of the elements of a cause of action," and so failed to satisfy the standard in *Twombly*). All the plaintiffs asserted, essentially, was that global processed magnesite prices were rising. *Animal Science*, 596 F. Supp. 2d at 876.

210. *Id.* at 865, 876–77 (citing *Dee-K*, 299 F.3d at 295–96). Judge Brown explained that to find otherwise might force upon the United States a self-imposed "quasi-embargo," in which defendants choose to sell products solely outside the U.S. to avoid the Sherman Act's reach—rather than change their pricing practices—creating a shortage of goods in the U.S. and encouraging an intermediary market from which the same goods were sold back to Americans at higher prices. *Id.* at 866 n.19.

211. *See supra* notes 106–108 and accompanying text (suggesting that judicial aversion to complaints against OPEC has only challenged plaintiffs to find new methods by which to rein in the cartel).

212. *See supra* note 183 (outlining NOPEC's leading requirement).

213. *See supra* note 207 (presuming against classification of the Chinese companies' acts as sovereign). Unlike in previous cases, where the sovereign immunity doctrine and the act of state doctrine were relied on to deny jurisdiction over cases involving OPEC, a case brought under the NOPEC bill would proceed unless disqualified on other grounds because NOPEC makes it immune from both doctrines. *Compare NOPEC*, S. 204, 111th Cong. § 2 (2009) (prohibiting application of the act of state doctrine or of sovereign immunity to claims brought under NOPEC), *and supra* notes 164–169 and accompanying text (analyzing the NOPEC bill), *with IAM (I)*, 477 F. Supp.

injury to the U.S. market that can be asserted is that global oil prices have increased.[214] A court applying *Animal Science*'s acts, targets and effects test, therefore, would likely hold that the plaintiff failed to state a claim because (1) OPEC Member Countries' or their affiliated companies' agreements to fix prices were made either in Austria or within each Member Country's territory,[215] far outside U.S. jurisdiction, (2) the target of OPEC production decisions was the global market,[216] without any specific U.S. focus, and (3) effects in the U.S. were minor with regard to effects felt worldwide.[217] The domestic spillover effects of OPEC's global production-cutting and price-fixing regime are neither direct nor substantial enough to satisfy NOPEC's standard for measuring anticompetitive harm.[218] A court should dismiss any case alleging violations of NOPEC by Member Countries and their affiliated companies.[219]

3. Plaintiffs Will Fail to State a Claim Under NOPEC

According to a narrow interpretation of NOPEC—one likely to be applied by the Supreme Court[220] should it hear the

at 569 (denying jurisdiction because of the sovereign immunity doctrine), *and IAM (II)*, 649 F.2d at 1361–62 (denying jurisdiction because of the act of state doctrine).

214. *See supra* note 41 (noting that OPEC decisions stabilized world prices at $50 when prices could have dropped to $40).

215. *See supra* note 22 (naming the Member Countries and their organizational home in Austria).

216. *See* OPEC FAQ, *supra* note 22, at 20 ("[OPEC's] Member Countries are constantly investing to ensure a continuous supply of oil to help fuel world economic growth."); *Rebuilding Trust in the Global Economy*, OPEC Bulletin, Oct. 2008, *available at* www.opec.org/library/OPEC%20Bulletin/2008/pdf/OB102008.pdf. ("[O]ne must call to mind here the most vulnerable members of the global economy, the least-developed countries, and ensure that they are not ultimately hit hardest by the crisis . . . . In this respect, as far as the oil industry is concerned, OPEC Member Countries will continue to ensure that the market remains well-supplied with crude oil at all times, in the interests of producers and consumers alike.").

217. *See supra* note 25 (listing global oil import levels at 25% for the U.S., 25% for Europe, 9% for Japan, and 33% for the rest of the world).

218. *See supra* note 194 and accompanying text (describing the threshold for establishing anticompetitive effect under NOPEC).

219. *See* Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842, 877 (D.N.J. 2008) (dismissing the claim against the Chinese companies because the U.S. company's claim failed the acts, targets, and effects test).

220. *See supra* notes 176–81 (remarking on Scalia's test).

matter—a plaintiff must rely on wrongful conduct other than subsidiary support and must establish anticompetitive harm other than from spillover effects if she hopes to make a case for proximate causation between the two and state a claim upon which relief may be granted. In cases against Subsidiaries, however, a plaintiff cannot show wrongful conduct because each Subsidiary's agreement with its affiliated Member Country amounts only to services in support of a going business—and not to collusion with other foreign states, their instrumentalities, or their agents.[221] Otherwise, in cases against Member Countries and their affiliated companies, a plaintiff is unable to show domestic harm other than increased prices, which are spillover effects from OPEC's foreign conduct aimed at foreign markets, and which are felt greater elsewhere than they are felt in the U.S. market.[222] A claim cannot be pleaded against Subsidiaries because wrongful conduct did not occur—and a claim cannot be pleaded against Member Countries and their affiliated companies because domestic anticompetitive effects are not cognizable.[223] Under the Supreme Court's probable interpretation of NOPEC, therefore, a plaintiff is no more likely to obtain jurisdiction over OPEC and its affiliates than the plaintiff was when sovereign immunity and the act of state doctrine applied.[224]

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221. *See supra* notes 195–203 and accompanying text (opining the difficulty of obtaining subject matter jurisdiction over U.S. subsidiaries of Member Country-affiliated companies).

222. *See supra* notes 183–91 and accompanying text (analogizing a FTAIA judicial interpretation of the standard for measuring domestic harm with NOPEC's standard, which has exactly the same language).

223. Because plaintiffs are unable to successfully plead a claim, it is doubtful that any case brought under NOPEC will survive a Federal Rule of Civil Procedure 12(b)(6) motion. *See In re RPP*, 649 F. Supp. 2d at 577 (granting defendants' 12(b)(6) motion).

224. *See supra* notes 109–28 and accompanying text (considering denials of subject matter jurisdiction in *IAM (I)*, because barred by sovereign immunity, and *IAM (II)*, because barred by the act of state doctrine); the drafters of the NOPEC bill are probably a bit dismayed by this. *See* O'Donnell, *supra* note 86, at 248 (mentioning that the NOPEC bill was introduced in order to overcome the holdings in *IAM (I)* and *IAM (II)*).

B. Does NOPEC Present a Political Question such that Courts Should Refrain from Adjudicating OPEC Cases on the Merits?

In the unlikely chance a court interprets NOPEC broadly enough to permit a plaintiff to successfully state a claim against OPEC, the Supreme Court will undoubtedly narrowly interpret the constitution's limits on its power to adjudicate.[225] The political question doctrine derives from the "case" or "controversy" requirements of Article III of the United States Constitution.[226] It prevents courts from enforcing a legal constraint on government conduct.[227] While no bright-line rules exist to classify political questions,[228] factors necessary for determining the doctrine's applicability were listed in *Baker v. Carr*.[229] Two of the six factors—the fourth and fifth in the list—

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225. *See* Jonathan R. Siegel, *Political Questions and Political Remedies*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 243, 250 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (arguing that the real political question doctrine is applied when "the challenged action was undoubtedly subject to legal constraint, but the court dismissed the case on the ground that the legal constraint was not judicially enforceable"); *cf.* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976) (claiming that the political question doctrine means "[t]he courts will not find limitations or prohibitions on the powers of the political branches where the Constitution does not prescribe any").

226. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial power extends to all Cases [or Controversies], in Law and Equity, arising under this Constitution . . . ."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–80 (1803) (holding that the Supreme Court is ultimate interpreter of the Constitution).

227. In other words, courts must "stay their hands" even when a defendant's acts were illegal. Siegel, *supra* note 225, at 253. The doctrine is appropriate in cases where "plaintiff's remedies are at the polling place, not the courts." Schroder v. Bush, 263 F.3d 1169, 1171 (10th Cir. 2001) (internal quotation marks omitted). One commentator noted this to be the case because, for bad political questions, politicians can be elected out of office; judges, however, because nominated to lifetime terms, are insulated from political pressures and thus unanswerable to the people. *See* Siegel, *supra* note 225, at 255, 257.

228. Baker v. Carr, 369 U.S. 209, 210–11 (1962) (stating that separation of powers concerns dictate that queries into the propriety of governmental actions must be pursued on a case-by-case basis).

229. *Id.* at 217. These guidelines state that the political question doctrine does not apply unless at least one of the following six factors are present:

(1) a textually demonstrable commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent

are clearly implicated if a plaintiff brings suit under NOPEC against OPEC Member Countries and their affiliates.[230] First, a court ruling against OPEC affiliates would express disrespect for the Executive branch, which has a long history of negotiating with Member Countries about their oil production.[231] Second, international security and environmental concerns create a need for continued adherence to the President's political decision to negotiate with Member Countries rather than publicly challenge the legality of their laws.[232] Under both factors, a Court decision either for or against OPEC would destroy international relations and constrain the President's ability to determine how best to faithfully execute the law.[233]

1. *Any Court Decision Would Express Disrespect for the President*

If a court agreed to hear a NOPEC claim against Member Countries or their affiliates, it would disrespect nearly forty years of Executive policy committed to cooperation instead of confrontation with the cartel.[234] Judge Lake, denying

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resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *In re RPP*, 649 F. Supp. 2d at 597 (citing Baker, 369 U.S. at 217).

230. *See In re RPP*, 649 F. Supp. 2d at 597 (holding that the fourth factor applied to cases against OPEC).

231. *See Baker*, 369 U.S. at 217 (referring to "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"); *supra* note 99 and accompanying text (discussing the President's policy of diplomatic negotiations as the only government-led strategy to challenge the conduct of foreign sovereigns).

232. *See Baker*, 369 U.S. at 217 (referring to "an unusual need for unquestioning adherence to a political decision already made"); *supra* notes 26-31 and accompanying text (stating that OPEC's political and economic motivations for their decisions include regional peace, global supply, and resource maintenance).

233. *See* U.S. CONST., art. II, § 3 (delegating to the President the power to "take Care that the Laws be faithfully executed"); *IAM (II)*, 649 F.2d at 1361 (arguing that a judgment for OPEC would weaken the President's hand at the bargaining table, while a judgment against OPEC may cause Member Countries to avoid future negotiations with the U.S.).

234. Served Defs.' Mot. Dismiss, *supra* note 179, at 14–18 (citing a *Chronology of the International Oil Policy of the United States*, an exhibit containing thirty-six years

justiciability in the *In re RPP* decision, forecasted that any ruling on the merits of OPEC actions would disrupt longstanding diplomatic relationships with Member Countries, undermining the Executive's constitutional responsibility to conduct foreign affairs.[235] By constraining the President's actions, the court would overstep its constitutional authority.[236]

a. *Disrupted Diplomatic Relationships*

The benefits of diplomatic relationships between the U.S and Member Countries have appeared in multifarious ways, from convincing Member Countries to ignore OPEC quotas and keep prices low,[237] to exempting Iraq, an original OPEC member, from OPEC regulations while struggling to rebuild after the American invasion,[238] to obtaining a voice in Mid-East politics,[239] to preventing the growth of Member Countries hostile to the U.S.[240] But a judgment either for or against OPEC

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worth of executive branch policy pronouncements regarding OPEC and the Member countries); *see also* Haberman, *supra* note 31 (reporting on consent decrees between the United States and domestic oil companies).

235. *In re RPP*, 649 F. Supp. 2d at 598. The Ninth Circuit agreed in *IAM (II)*, writing that "[t]he possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them is apparent from the very nature of this action." *IAM (II)*, 649 F.2d at 1361.

236. *See supra* notes 226–27 and accompanying text (analyzing the political question doctrine).

237. *See, e.g.*, LEWIS, *supra* note 43 (reporting on President Obama's ability to convince Saudi Arabian King Abdullah to keep prices at 2/3 the optimum level for investment in order to ease the strain of the 2007–09 recession).

238. *See Platts: OPEC Output Falls*, *supra* note 37 (writing that OPEC exempted Iraq until Iraq returned to old production levels).

239. *See* SKEET, *supra* note 20, at 100, 106 (tying U.S. diplomatic pressure on Saudi Arabia to the end of the Arab Oil Embargo without achieving the embargo's goal of pushing Israel completely back to its pre-1967 borders); *see also* Shahar Ilan & Nadav Shragai, *Olmert: Israel Must Return to 1967 Borders*, HAARETZ.COM, Nov. 12, 2008, *available at* http://www.haaretz.com/hasen/spages/1036118.html (noting that Israel has still not returned to its pre-1967 borders).

240. *See* SKEET, *supra* note 20, at 232 (explaining that Saudi Arabia often finds it impossible to act in opposition to U.S. preferences); *Id.* at 106 (acknowledging that U.S. military protection of Saudi Arabia prevented Iran from declaring war on Saudi Arabia during Iran's attacks on Wahhabi Islam); *see also* Jessica Drum, *Vying for Influence: Saudi Arabia's Reaction to Iran's Advancing Nuclear Program*, NTI.ORG, July 2008, http://www.nti.org/e_research/e3_vying_influence_saudi_arabia_iran_nuclear.html (last visited Feb. 5, 2010) (discussing the dynamic relationship between Saudi Arabia, Iran,

would severely injure if not terminate these diplomatic relationships. A court ruling in favor of OPEC, on the one hand, would greatly strengthen the bargaining hands of Member Countries in the event the President—or Congress for that matter—chose to condemn OPEC's actions.[241] A court ruling against OPEC, on the other hand, would either subject Member Countries to enormous penalties[242] or would cause Member Country-affiliated companies to withdraw from the U.S market;[243] in both cases, the extra costs would be passed right back to American consumers, causing prices to escalate even further.[244] And in any case, the President's ability to rely on longstanding diplomatic relationships to serve U.S. interests abroad would be constrained.[245]

b. *Undermined Foreign Affairs Power*

Court decisions on the merits of a case against OPEC also undermine the President's ability to conduct foreign affairs.[246] The foreign affairs power is a traditional executive power.[247] This power is expressly limited by the Constitution in three areas—war, commerce, and treaties—the first and second of which, war and commerce, are expressly in Congress's domain;[248] the final of which, treaties, requires the advice and consent of the Senate.[249] The treaty power remains largely with

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and the U.S., and the Saudi's fear over a nuclear Iran).

241. *IAM (II)*, 649 F.2d at 1361 (citation omitted). OPEC would be able to laugh at the President and say, "What can you do? Your court already said I was doing nothing illegal. You can't change that, now!"

242. The Sherman Act, in which the NOPEC bill would be codified, permits treble damages to be recovered against anticompetitive harm. 15 U.S.C. § 15 (2006).

243. *See* Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842, 866 n.19 (D.N.J. 2008) (describing the self-imposed quasi-embargo America would force on petroleum imports).

244. *Id.*; U.S. demand, at 25% of global demand, will not soon temper, even in the face of rising prices. *See* BP, *supra* note 3 (noting U.S. demand proclivities).

245. *See IAM (II)*, 649 F.2d at 1361 (describing the "grave interest" in Middle East states taken by the United States).

246. *Id.* (describing the real possibility of insult to Member States).

247. *See* Prakash & Ramsey, *supra* note 48, at 252 (referring to the Framers' conception).

248. U.S. CONST., art. I, § 8, cls. 3, 11.

249. *Id.* art. II, § 2, cl. 2. Congress gives its consent in a trade agreement, for

the President, however, who has complete control over a treaty's negotiation or abrogation.[250] Its purpose is to make domestic laws internationally binding or to secure commitments from foreign states.[251]

Should Congress pass NOPEC, which attempts to bind U.S. antitrust law to OPEC Member Countries,[252] the law will remain ineffective as to the Member Countries until the President enters into or amends current treaties with them.[253] These implementations will take some time, especially where some existing treaties between the United States and Member Countries promise not to "[limit] the right of either Government to impose . . . [internal] regulations for the enforcement of police or revenue laws."[254] A court decision on the merits of a NOPEC claim before the President has fully executed his treaty power will undermine his ability to negotiate new or amended treaties, especially after he loses valuable bargaining chips along the way.[255]

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instance, by passing legislation establishing the terms of trade; the President is unable to establish the terms of trade, himself. Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 15 (2006).

250. Goldwater v. Carter, 444 U.S. 996, 996 (1979) (permitting President Jimmy Carter to abrogate a treaty with Taiwan without the consent of the Senate). *But see* Prakash & Ramsey, *supra* note 48, at 249 & n.76 (discussing how debate over the President's power here is "inconclusive").

251. Lawson & Seidman, *supra* note 249, at 15.

252. Gas Price Relief for Consumers Act of 2008, H.R. 6076, 110th Cong. § 102 (2008).

253. *See* Lawson & Seidman, *supra* note 249, at 54 (noting that the President, not Congress, has the power to implement the treaty); Congress's commerce power—which, in the arena of foreign affairs, is limited to "commerce with foreign nations" and not *among* foreign nations—is powerless to regulate the Member Countries' collusive acts, otherwise. *See* Colangelo, *supra* note 48, at 149 ("Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States.") (citations omitted); Moreover, the Constitution is hierarchically superior to treaties; Congress's inability to regulate purely foreign commerce is greater than any treaty the President might enter into, so Congress is stuck with whatever the President finally decides. Lawson & Seidman, *supra* note 249, at 55.

254. *Provisional Agreement*, *supra* note 94, art. IV (with Saudi Arabia); *see* text accompanying *supra* note 28 (remarking that most Member Countries receive 90% of state revenues from oil production and sale).

255. *See supra* notes 237–44 and accompanying text (analyzing disruptions to diplomatic relations).

2. *Any Court Decision Would Ignore the Unusual Need for Unquestioning Adherence to Previous Political Decisions*

Almost forty years of Executive branch political decisions have stressed that cooperation and not confrontation must mark U.S. relationships with OPEC.[256] This is true for a number of political, economic, environmental, and security reasons.[257] For instance, OPEC works as a peace treaty between Member Countries[258] who have shown proclivities to war and violence over oil supplies that might interrupt international oil production.[259] It ensures a steady revenue source to countries who depend on oil for 90% of state income.[260] Its pricing decisions help preserve global oil supplies, which will peak and begin to deplete within the next fifty years.[261] It tempers Mid-East attitudes toward an American and an Israeli presence in the area.[262] Furthermore, the diplomatic relationships forged in OPEC have been instrumental in helping the U.S. root out and destroy terror cells around the world.[263] This network of

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256. *See, e.g.*, Press Release of Sec'y of State Henry Kissinger, *Statement to the Washington Energy Conference* (Feb. 13, 1974), DEP'T ST. BULL. 201 (Mar. 4, 1974) ("The seriousness of the problem, its pervasiveness, and the impossibility of national solutions all compel international co-operation—among major consumer nations, among developed and developing nations, and among producer and consumer nations."); Transcript of Press Meeting with U.S. Sec'y of Energy Bill Richardson and Norwegian Minister of Petroleum and Energy Olav Akselsen, Government Guest House Oslo, Norway (Mar. 23, 2000) ("Quiet diplomacy is working and . . . restrictive legislation, punitive legislation is not only not going to work, but . . . is counterproductive"), *quoted in* Served Defs.' Mot. Dismiss, *supra* note 179, at 26; *see also* LEWIS, *supra* note 43 (reporting on President Obama's willingness to negotiate with OPEC).

257. *See infra* notes 258–262 and accompanying text.

258. *See* SKEET, *supra* note 20, at 227 (discussing the effect of OPEC price management on maintenance of external relationships).

259. *Id.* at 231 (describing the tenuous relationships between the Gulf states tempered by the need to maintain acceptable relationships).

260. *See* SKEET, *supra* note 20, at 227.

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

262. *See supra* notes 238–40 and accompanying text.

263. *See, e.g.*, Oliver Conway, *Saudi Arabia's 'War on Terror'*, BBC NEWS, May 29, 2004, http://news.bbc.co.uk/2/hi/middle_east/3759993.stm (last visited Feb. 5, 2010) (reporting that, in response to foreign terror attacks, the Saudi government has "launched an unprecedented crackdown" on suspected terrorists).

relationships has created a tenuous global peace.[264]

Should a U.S. court rule on the merits of a NOPEC claim, OPEC's network of allies, treaties, and economic and conservation regulations might crumble.[265] Alternatively—considering the U.S.'s recently diminished role in global politics—OPEC Member Countries may ignore the judgment, deciding instead to divest affiliated U.S. subsidiaries and exit the market entirely, terminating all contacts with the U.S.[266] A court decision that declares NOPEC cases justiciable would thus place a major constraint on the President's foreign affairs power.[267] Faced with this winless scenario, courts should recognize an unusual need for unquestioning adherence to prior political decisions and dismiss cases against OPEC for failure to state a claim.[268]

3. *NOPEC Presents Courts with Nonjusticiable Political Questions*

Under a narrow interpretation of the Constitution, the

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264. However, some may counter that this network is the cause of all the world's problems. *See, e.g.*, Robert Zubrin, *Breaking OPEC's Grip*, NAT'L REV. ONLINE, Feb. 14, 2008, http://article.nationalreview.com/print/?q=ZTg5NjkyMmJhNjJiNjIxMWIwNDkzNWZmOWZlMjgzZTg= (arguing that OPEC funnels U.S. funds to terrorists).

265. Some commentators hope for this to happen and see the NOPEC bill as a good start. *See id.*

266. *See supra* notes 237–41 and accompanying text (predicting diminished diplomatic relations and foreign affairs power for the President); Energy Intelligence Group, *AG Uneasy About 'NOPEC' Bill*, 58 OIL DAILY 132 (Jul. 10, 2008) (quoting then Attorney General Michael Mukasey that "OPEC can, as a cartel, essentially cease to do business with us, which would make things worse rather than better"). This would significantly increase domestic oil prices. *See* Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842, 866 n.19 (D.N.J. 2008) (describing how a self-imposed quasi-embargo on petroleum imports would result from a U.S. court ruling against NOPEC which could, in turn, increase oil prices within the United States).

267. *See supra* notes 246–255 (remarking on Executive foreign affairs power).

268. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (referring to "an unusual need for unquestioning adherence to a political decision already made"); *supra* notes 26–31 and accompanying text (stating that OPEC's political and economic motivations for their decisions include regional peace, global supply, and resource maintenance); *In re RPP*, 649 F. Supp. 2d 572, 579 (S.D. Tex. 2009) (citing *Baker*, 369 U.S. at 196) ("[D]ismissals for lack of a justiciable question are properly treated as dismissals for failure to state a claim.").

Supreme Court will likely dismiss cases brought under NOPEC because the bill presents two nonjusticiable political questions.[269] First, the claim expresses disrespect for the Executive branch, which has a long history of negotiating with Member Countries about their oil production, and would severely limit the President's foreign affairs powers.[270] Second, a number of political, economic, environmental, and security reasons create an unusual need for unquestioning adherence to previous Executive decisions to negotiate with Member Countries rather than publicly challenge the legality of their laws.[271] For these reasons, a Court's decision on the merits against OPEC would destroy international relations and constrain the President's ability to faithfully execute his constitutional responsibilities.[272]

V. CONCLUSION

The NOPEC bill's ability to deliver on its promises appears to have been substantially oversold.[273] The Supreme Court is unlikely to allow recovery against OPEC if the claim is based on NOPEC's overly broad language.[274] The Court's principles of

269. "[D]ismissals for lack of a justiciable question are properly treated as dismissals for failure to state a claim." *In re RPP*, 649 F. Supp. 2d at 579 (citing *Baker*, 369 U.S. at 196).

270. *See id.* at 217 (referring to "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"); *supra* note 99 and accompanying text (discussing the President's policy of diplomatic negotiations as the only government-led strategy to challenge the conduct of foreign sovereigns).

271. *See Baker*, 369 U.S. at 217 (referring to "an unusual need for unquestioning adherence to a political decision already made"); *supra* notes 26–31 and accompanying text (stating that OPEC's political and economic motivations for their decisions include regional peace, global supply, and resource maintenance).

272. *See* U.S. CONST., art. II, § 3 (delegating to the President the power to "take Care that the Laws be faithfully executed"); *IAM (II)*, 649 F.2d at 1361 (9th Cir. 1981) (arguing that a judgment for OPEC would weaken the President's hand at the bargaining table, while a judgment against OPEC may cause Member Countries to avoid future negotiations with the United States).

273. *See* REINKER, *supra* note 173, at 297 (predicting the NOPEC bill will "increase litigation costs, potentially embroil the courts in foreign policy, and create difficult sovereign immunity questions that could be avoided by not applying antitrust law abroad").

274. *See supra* notes 183–224.

statutory construction would limit the bill's operation and effect to clearly cognizable wrongful conduct that immediately and proximately causes domestic anticompetitive effects.[275] Therefore, no claim can be pleaded against Member Country-affiliated companies' U.S. subsidiaries because the bill fails to identify their wrongful conduct—and no claim can be pleaded against Member Countries and their affiliated companies because the bill fails to identify the domestic anticompetitive effects of their foreign conduct.[276] Furthermore, even if the Court interpreted NOPEC broadly enough to allow plaintiffs to state a claim upon which relief may be granted, the current Court's famously narrow construction of the Constitution would lead it to dismiss cases brought under NOPEC as nonjusticiable under the political question doctrine.[277]

Justice Scalia should not have to work too hard to bring other justices on board with this ruling: NOPEC's misleadingly ambiguous language fits too closely with Court precedents to allow cases brought under it to proceed to trial.[278] Future claims under the NOPEC bill will be subject to *American Banana*'s jurisdictional principles of the Sherman Act's extraterritorial reach.[279] When NOPEC's drafters wrote the bill to prevent

275. *See supra* notes 174–81 and accompanying text.

276. Because plaintiffs are unable to successfully plead a claim, it is doubtful that any case brought under NOPEC will survive a Federal Rule of Civil Procedure 12(b)(6) motion. *See In re RPP*, 649 F. Supp. 2d at 577 (granting defendants' 12(b)(6) motion).

277. "[D]ismissals for lack of a justiciable question are properly treated as dismissals for failure to state a claim." *In re RPP*, 649 F. Supp. 2d at 577 (citing *Baker*, 369 U.S. at 196). *See generally* Looper, *supra* note 175 (discussing the Roberts Courts' incredibly narrow interpretation of the constitution).

278. *See, e.g.*, *Twombly*, 550 U.S. at 555 (holding that a claim must clearly show that the pleader is entitled to relief); *Am. Banana*, 213 U.S. at 357 (1909) (holding that the Sherman Act's extraterritorial reach does not extend to foreign conduct with foreign effects).

279. *See supra* notes 72–75 and accompanying text (discussing *American Banana*). By adopting this rule, the Court takes the "Sherman Act back in the direction of *American Banana* and away from punishing overseas restraints by foreigners on U.S. export [activities]." Baker & Miller, *supra* note 78, at 91; OPEC can continue operating as it always had—as long as its producers do not sell directly to the U.S. market. *But see* Emily Heller, *Global Diamond Cartel is Cut Down to Size*, NAT'L L.J., Oct. 6, 2008, at S4 (discussing how the United States finally obtained jurisdiction over DeBeers—when top DeBeers executives agreed to appear before an Ohio court in a criminal matter).

OPEC and its Member Countries from relying on protections afforded by sovereign immunity and the act of state doctrine,[280] the drafters probably never contemplated that their bill would completely exempt current cartel activities from the extraterritorial reach of U.S. antitrust laws.[281] Recognizing now the probable operation and effects of their bill, these drafters should permit NOPEC to die a final death.

280. *See NOPEC*, S. 204 111th Cong. § 2 (2009).

281. *See supra* note 276 and accompanying text.