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Survey of the Domestic Approaches to Antitrust Taken by the OPEC Member Nations: Do They Practice What They Preach, A

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Comments

A Survey of the Domestic Approaches to Antitrust Taken by the OPEC Member Nations: Do They Practice What They Preach?

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I. Introduction

The prices of petroleum products, especially sweet crude oil and gasoline, are at rates that were unimaginable even ten years ago.[1] The

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1. According to the U.S. Department of Energy, gasoline prices on October 18, 2004, were 92 cents higher for a gallon of regular grade than they were on November 28, 1994. This represents an increase of approximately 71 percent. *See* U.S. Department of

United States consumes more oil today than ever before[2] and its domestic production covers only a fraction of its usage.[3] In response to this consumption/production deficit, the U.S. imports oil from various nations,[4] including member nations of the Organization of the Petroleum Exporting Countries (OPEC).[5]

In an attempt to maximize their profits from oil, OPEC member nations agree to limit or expand production of oil to create and maintain artificially inflated oil prices.[6] These collusive activities of OPEC, if done by corporations or individuals, would clearly violate U.S. antitrust law.[7]

Energy, Retail Gasoline Historical Prices *at* http://www.eia.doe.gov/oil_gas/petroleum/data_publications/wrgp/mogas_history.html (last visited October 19, 2004). Retail gasoline prices hit record highs this spring, when, on May 24, 2004, a gallon of regular gasoline averaged $2.06, and a gallon of premium grade averaged $2.24. *Id.* On October 22, 2004, the price of crude oil reached a 21-year high of $55.17 per barrel. *See* E.S. Browning, *Dow Industrials Rally 138 Points as Insurers Rise*, WALL STREET JOURNAL, Oct. 27, 2004, *at* C1.

2. In 2000, the U.S. consumed approximately 20 million barrels of oil per day between transportation, industrial use, electrical production, residential and commercial use. U.S. Department of Energy, Figure 14 Petroleum Consumption by Sector, *available at* http://www.eia.doe.gov/emeu/aer/eh/frame.html (last visited September 6, 2004).

3. In 2000, the U.S. produced roughly 8 million barrels of oil each day, and imported roughly 12 million barrels of oil each day. U.S. Department of Energy, Figure 11 Petroleum Overview *at* http://www.eia.doe.gov/emeu/aer/eh/frame.html (last visited September 6, 2004).

4. In 2003, the U.S. imported approximately 43 percent of its imported oil from OPEC countries. *See* U.S. Department of Energy, Overview of U.S. Petroleum Trade: August Monthly Energy Review, *available at* http://tonto.eia.doe.gov/merquery/mer_data.asp?table=T01.07 (last visited September 6, 2004).

5. In 2003, the U.S. imported approximately 4.4 billion barrels of oil. *See* U.S. Department of Energy, Overview of U.S. Petroleum Trade: August Monthly Energy Review, *available at* http://tonto.eia.doe.gov/merquery/mer_data.asp?table=T01.07 (last visited September 6, 2004). In contrast, the U.S. exported 361 million barrels of oil in 2003. *See id.*

OPEC's current membership is comprised of eleven countries. They include: Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates and Venezuela. *See* Member Countries *available at* http://www.opec.org (last visited Sept. 27, 2004).

6. General Information Booklet 10-11 *at* http://www.opec.org (last modified 2002) [hereinafter OPEC Booklet].

7. *See, e.g.*, Prewitt Enters., Inc. v. Org. of the Petroleum Exporting Countries, 2001 WL 624789, 9 (N.D. Ala. 2001) [hereinafter Prewitt], *vacated and reheard by* Prewitt Enters., Inc., v. Org. of the Petroleum Exporting Countries, 2004 WL 2039664 (N.D. Ala. 2004) (finding OPEC, who did not appear, is a *per se* violation of U.S. antitrust law and imposed default judgment, as well as injunctive relief).

Pursuant to a motion by OPEC, who made a special appearance after initially failing to respond, the default judgment and injunctive relief were subsequently vacated. OPEC also made a motion to dismiss for insufficiency of service of process, which was granted. Prewitt appealed and the Eleventh Circuit Court of Appeals affirmed. Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries, 353 F.3d 916 (11th Cir. 2003) [hereinafter Prewitt 2], *rehearing en banc denied by* Prewitt Enters. v. Org. of Petroleum Exporting

Not all countries, however, share the same attitudes about free competition in the marketplace. This is especially true of those few remaining countries that embrace communist[8] and socialist[9] ideologies.

To date, there has been no single investigation of the domestic attitudes of the OPEC member nations towards antitrust, as reflected in their respective codifications. This comment attempts to do that.

Part II of this comment will briefly introduce the background of OPEC, including its formation, membership, internal composition, operation and goals. Part III will then provide a brief overview of the various U.S. antitrust statutes, as well as their historical inapplicability to OPEC.

Part IV will report on the domestic antitrust laws of each of OPEC's member nations, seeking to determine if the OPEC nations practice what they preach, or, whether they act in a contradictory manner with respect to their domestic codifications. Part V will summarize and discuss the implications of the survey's results, as well as highlight recent developments, including the Iraq question. Part V will conclude with suggestions on how the U.S. can minimize OPEC's negative effects.

II. OPEC

A. Formation

OPEC was created through various resolutions adopted at the Conference of the Representatives of the Governments of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela, held in Baghdad, Iraq, in September of 1960.[10] However, its formative origin is found in 1949, when Venezuela, which sought to develop closer and more regular communications regarding the price of oil, initiated discussions with Iran, Iraq, Kuwait and Saudi Arabia.[11]

Further discussions were held a decade later, in 1959, at the First Arab Petroleum Congress, at which time the attending nations agreed to consult with one another before taking unilateral action with regard to oil

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Countries, 2004 U.S. App. LEXIS 12376 (11th Cir. 2004), *petition for cert. filed*, ___ U.S.L.W. (U.S. May 25, 2004) (NO. 03-1592).

8. China, Laos, Vietnam and Cuba are the only remaining communist countries. *See* Communist Countries *at* http://www.aneki.com/communist.html (last visited Jan. 17, 2004).

9. North Korea is currently the only socialist country. *See* Socialist Countries *available at* http://www.aneki.com/socialist.html (last visited Jan. 17, 2004).

10. OPEC Statute, approved Jan. 1961, Chapter 1, art. 1 *available at* http://www.opec.org/Publications/OS/OS.pdf (last modified 2000) [hereinafter OPEC Statute].

11. OPEC Booklet, *supra* note 6, at 5.

prices.[12] Additionally, the countries formed an Oil Consultation Commission.[13] One year later, in response to its disapproval of then existing oil prices, Iraq invited representatives from Iran, Kuwait, Saudi Arabia and Venezuela, to Baghdad for further discussions.[14] The product of that conference was OPEC.[15]

B. Membership

Headquartered in Vienna, Austria,[16] OPEC's current membership includes: Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia and Venezuela.[17] Former members included Ecuador[18] and Gabon,[19] who suspended and terminated their memberships, respectively, in 1992 and 1995.[20]

Member countries can be either full members or associate members.[21] Full members are the original founding members, as well as interested countries with a substantial net export of crude oil, who also share fundamentally similar interests with the member nations.[22] Prospective full members can be admitted to the organization by a three-fourths majority vote of the full members, as well as a unanimous vote by the founding members.[23] Associate members are those members who do not qualify as full members, but who are admitted by a three-fourths majority vote of members, including a unanimous vote by the founding members.[24]

C. Internal Composition and Operation

OPEC consists of three major subdivisions: (1) the Conference, (2) the Board of Governors and (3) the Secretariat.[25] The Conference is

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12. *Id.*
13. *Id.*
14. *Id*; OPEC Statute, *supra* note 10, at Chapter 1, art. 1.
15. OPEC Booklet, *supra* note 6, at 5.
16. About OPEC—History, *available at* http://www.opec.org (last visited Sept. 6, 2004).
17. *See supra* note 5 and accompanying text.
18. Ecuador suspended its membership in OPEC on November 27th, 1992, citing its inability to meet its membership dues. *See Ecuador Set to Leave OPEC*, NEW YORK TIMES, Sept. 18, 1992, at D16.
19. Citing excessive membership fees, Gabon withdrew from OPEC at the end of 1995. *See Gabon To Withdraw From OPEC Over Heavy Membership Dues*, CHICAGO TRIBUNE, Jan. 16, 1995, at Business 2.
20. OPEC Booklet, *supra* note 6, at 13.
21. OPEC Statute, *supra* note 10, at Chapter 2, art. 7(A-D).
22. *Id.* at Chapter 2, art. 7(B-C).
23. *Id.*; OPEC Booklet, *supra* note 6, at 12.
24. *Id.* at Chapter 2, art. 7(D); OPEC Booklet, *supra* note 6, at 12.
25. OPEC Statute, *supra* note 10, at Chapter 3, art. 9.

the main power base of the organization,[26] meets at least twice per year,[27] and consists of a delegation from each of the member nations.[28] Each delegation is allowed one vote.[29] The Conference is responsible for the generation of the organization's policy goals, as well as the means through which to achieve them.[30]

The Board of Governors, which also meets twice per year,[31] consists of one governor for each member nation,[32] nominated by each member nation,[33] and who is confirmed by the Conference.[34] As with the Conference, the governor from each member nation is allowed one vote.[35] The Board is charged with managing the organization,[36] implementing decisions of the Conference,[37] preparing an annual budget,[38] and various other managerial functions.[39]

The Secretariat acts as the executive of the organization and is under the direction of the Board of Governors.[40] The Secretariat consists of a Secretary General and his or her staff,[41] whose function is to act as the representative of the organization, directing its affairs.[42]

D. Goals

OPEC's primary goal is simple: to create a global oil market that

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26. *Id.* at Chapter 3, art. 10; *see also* OPEC Booklet, *supra* note 6, at 6.
27. OPEC Statute, *supra* note 10, at Chapter 3, art. 12; OPEC Booklet, *supra* note 6, at 6.
28. OPEC Statute, *supra* note 10, at Chapter 3, art. 11(A).
29. *Id.* at Chapter 3, art. 11(C).
30. *Id.* at Chapter 3, art. 15; OPEC Booklet, *supra* note 6, at 6.
31. OPEC Statute, *supra* note 10, at Chapter 3, art. 18(A).
32. OPEC Booklet, *supra* note 6, at 7.
33. OPEC Statute, *supra* note 10, at Chapter 3, art. 17(A); OPEC Booklet, *supra* note 6, at 7.
34. OPEC Statute, *supra* note 10, at Chapter 3, art. 17(A); OPEC Booklet, *supra* note 6, at 7.
35. OPEC Statute, *supra* note 10, at Chapter 3, art. 17(D).
36. *Id.* at Chapter 3, art. 20(1); OPEC Booklet, *supra* note 6, at 7.
37. OPEC Statute, *supra* note 10, at Chapter 3, art. 20(1); OPEC Booklet, *supra* note 6, at 7.
38. OPEC Statute, *supra* note 10, at Chapter 3, art. 20(4); OPEC Booklet, *supra* note 6, at 7. OPEC is funded by its member nations. OPEC Statute, *supra* note 10, at Chapter 5, art. 37-38.
39. *See* OPEC Statute, *supra* note 10, at Chapter 3, arts. 20-24; *see* OPEC Booklet, *supra* note 6, at 7.
40. OPEC Statute, *supra* note 10, at Chapter 3, art. 25; OPEC Booklet, *supra* note 6, at 7.
41. OPEC Statute, *supra* note 10, at Chapter 3, art. 26; OPEC Booklet, *supra* note 6, at 7.
42. OPEC Statute, *supra* note 10, at Chapter 3, art. 27(A-B); OPEC Booklet, *supra* note 6, at 7.

fosters consistent profits for member nations.[43] The organization has been quite forthright in its goals, declaring them in its Statute,[44] sundry news releases[45] and various OPEC publications.[46]

The pursuit of profits is innocuous in itself, as it is the essence of capitalism.[47] However, the means by which the organization seeks to achieve that goal have garnered OPEC perpetual disdain within the United States.[48]

III. U.S. Antitrust Law

Through the juxtaposition of the domestic antitrust laws of the OPEC member nations, with those of the U.S., it is possible to better understand the disparities revealed by this survey, detailed *infra*. In the broadest terms, "antitrust" refers to various proscribed actions taken by market participants, which include: developing monopolies, price discrimination, price-fixing and unlawful restraint of trade.[49]

Congress, in response to the deleterious effects of these proscribed activities, has enacted three major Acts designed to protect consumers and businesses, as well as the American economy as a whole. The three acts are the Sherman,[50] the Clayton,[51] and the Robinson-Patman[52] Acts. The Clayton and Robinson-Patman Acts were the product of Congress'

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43. OPEC Statute, *supra* note 10, at Chapter 1, art. 2(A-B); OPEC Booklet, *supra* note 6, at 10-11.

44. OPEC Statute, *supra* note 10, at Chapter 1, art. 2.

45. *See, e.g.*, Prewitt, *supra* note 7, at 3 (wherein court cites "107th Meeting of the OPEC Conference," OPEC Press Release No. 2/1999 (March 23, 1999), in which OPEC announced its decision to reduce and limit oil production to try and increase oil prices, and "Report of the 26th Meeting of the [OPEC] Ministerial Monitoring Sub-Committee," OPEC Press Release No. 4/1999 (July 30, 1999), wherein OPEC reports on the effects of the aforementioned reduction in production).

46. *See generally* OPEC Booklet, *supra* note 6.

47. *See* Joel F. Herold, *Wages, Workers, and Potential Windfalls: Rethinking Section 8(A)(3) Labor Disputes In a Capitalist Economy*, 66 GEO. WASH. L. REV. 657 n.170 (1998) (*citing* ANDREW ZIMBALIST ET AL., COMPARING ECONOMIC SYSTEMS: A POLITICAL-ECONOMIC APPROACH 5 (2d ed. 1989)).

48. Andrew C. Udin, Comment, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U. L. REV. 1321, 1324 (2001) (*citing* 146 Cong. Rec. S1942, wherein OPEC's price-fixing practices are deemed "reprehensible") [hereinafter Udin].

Recently released 30 year-old British intelligence documents reveal that during the height of the OPEC oil embargo of 1973-74, the U.S. seriously considered seizing several key oil fields in Saudi Arabia, Kuwait and Abu Dhabi. Glenn Frankel, *U.S. Mulled Seizing Oil Fields In '73; British Memo Cites Notion of Sending Airborne to Mideast*, WASHINGTON POST, Jan. 1, 2004, *at* A01.

49. *See* Udin, *supra* note 48, at 1331-32 nn.66-69.

50. 15 U.S.C. §§ 1-7 (2000).

51. 15 U.S.C. § 12 (1997).

52. 15 U.S.C. §§ 13, 13a-b, 21a (2003).

attempt to more fully effectuate the purposes of the Sherman Act,[53] which represents the bedrock foundation of U.S. Antitrust law.[54]

The Sherman Antitrust Act was enacted to protect consumers from the evils of a market without the benefits of natural competition, as well as to facilitate economic efficiency.[55] The theoretical underpinning of the Act is the belief that, through the rigors of fair competition between market participants, the best products at the lowest prices will emerge, and an environment will be created simultaneously which is conducive to the fostering of democratic political and social institutions.[56]

The Act provides, in relevant part, "[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, is hereby declared to be illegal."[57] Read literally, the language of the statute makes all contracts illegal because every contract works, in some way, as a restraint of trade.[58] Therefore, American courts have interpreted the statute so as to proscribe contracts that "unreasonably" restrain competition.[59]

Price-fixing is a prime example of the type of conduct proscribed by the Act, and has been defined as: groups or associations "formed for the purpose and with the effect of raising, depressing, fixing . . . or stabilizing the price of a commodity in . . . commerce."[60] A comparison of the OPEC Statute's objective, noted *infra*, found in Chapter 1, Article 2 (B-C), is chilling in its similarity to the proscribed conduct in the aforementioned definition of price-fixing.

Section B of Article 2 provides, in relevant part: "the Organization shall devise ways and means of ensuring the *stabilization of prices* . . .

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53. Udin, *supra* note 48, at 1332 n.72 (*citing* Richard A. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences 1 (1976)).

54. The Clayton and Robinson-Patman Acts are more specific in nature, and, therefore, are beyond the scope of this comment. As such, they will not be discussed further.

55. Jarod Spencer Gonzalez, *Antitrust Law: A long Time Coming—United States Supreme Court Adopts The "Rule of Reason" Test for Vertical Maximum Price Fixing Cases in State Oil Co. v. Khan,* 52 OKLA. L. REV. 645 n.5 (1999).

56. Udin, *supra* note 48, at 1333 (*citing* N. Pac. Ry. v. United States, 356 U.S. 1, 4 (1958)).

57. 15 U.S.C. § 1.

58. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687 (1978) (stating that if the provision was read literally, the Act would outlaw the entire body of contract law because all contracts restrain trade).

59. *See, e.g.*, Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); Chicago Bd. of Trade v. United States, 246 U.S. 241 (1918).

60. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); *see* Udin, *supra* note 48, at 1333-34 (*citing* Douglas R. Richmond, *Private Colleges and Tuition Price-Fixing: An Antitrust Primer*, 17 J.C. & U.L. 271, 275 (1991)).

with a view to *eliminating . . . fluctuations*."[61] Additionally, Section C of Article 2 provides that "due regard shall be given at all times to the interests of . . . *securing a steady income* to the producing countries. . . ."[62] Through the comparison of OPEC's express objective, with the foregoing definition of price-fixing, it becomes clear OPEC's objective is quite nearly a verbatim reiteration of the definition of price-fixing.

A. Historical Application of U.S. Antitrust Law to OPEC

Since its inception in 1960, the collusive actions of OPEC have spoken much louder than the words of its objective, *supra*, unabashedly declaring OPEC's aim. Indeed, OPEC has been the defendant in two major antitrust cases. The first such case was *International Ass'n of Machinists v. OPEC.*

1. International Ass'n of Machinists v. OPEC

The American public's attitude about OPEC has never been more virulent than it was during the height of the oil crises of the 1970's.[63] At that time, the U.S.'s oil supplies were at such low levels, Americans were only able to fill their vehicles with gasoline on certain days—depending on their license plate numbers—and long lines of frustrated motorists wrapped around U.S. city blocks.[64] In an attempt to stave the demand for gasoline, the speed limit on roadways was reduced to fifty-five miles per hour.[65] Additionally, as a means of increasing domestic production of oil, and, thereby, reducing the nation's dependence on OPEC oil, the U.S. constructed the trans-Alaskan oil pipeline, which went on-line in 1977.[66]

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61. OPEC Statute, *supra* note 10, at Chapter 1, art. 2(B) (emphasis provided); OPEC Booklet, *supra* note 6, at 10-11.

62. OPEC Statute, *supra* note 10, at Chapter 1, art. 2(C) (emphasis provided); OPEC Booklet, *supra* note 6, at 10-11 (emphasis provided).

63. Udin, *supra* note 48, at 1322 (*citing* Barbara Rudolph, *Enjoy Now, Pay Later; As Oil Imports Raise and Output Falls, the U.S. May Face a Future Shock*, 129 TIME MAGAZINE, Mar. 16, 1987, at 54, *available at* 1987 WL 2364550 (detailing the oil crisis of the 1970's)).

64. Udin, *supra* note 48, at 1322 (*citing* DANIEL YERGIN, THE PRIZE, 616 (1991) (discussing the various vexing aspects of the oil crisis, including the drastic raise in prices, the long lines, and the limited supply of gasoline, leading to some outages).

65. Report to Congress, The Effect of Increased Speed Limits in the Post-NMSL Era, National Highway Traffic Safety Administration 1 (Feb. 1998) *available at* http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/1998/Speedlim.pdf (last visited Sept. 6, 2004).

66. *See* Alyeska Pipeline, *available at* http://www.alyeska-pipe.com (last visited Sept. 6, 2004).

As far as the general population was concerned, OPEC was the culprit of the shortages and its member states bore the brunt of the nation's collective enmity. From that acrimonious atmosphere came the first antitrust suit against OPEC, that of *International Ass'n of Machinists v. OPEC*.[67]

a. District court

In 1978, a labor union filed an action which sought monetary damages from, and injunctive relief against, OPEC and its member nations,[68] alleging price-fixing of oil by OPEC and its member nations in violation of the Sherman Act.[69] Neither OPEC, nor any of its various member nations, made an appearance.[70] At the conclusion of the hearing, the court granted judgment for the defendants, and in its opinion, insulated OPEC with a bulwark of defenses against liability.[71]

The court provided the following as a bar to liability: 1) OPEC could not be and was not legally served[72] under the Foreign Sovereign Immunities Act;[73] 2) The claims for damages failed because of the direct purchaser doctrine, which requires a putative plaintiff to have dealt directly with the defendant(s);[74] 3) Foreign nations were not "persons" for purposes of the Sherman Act, and, therefore, were exempt;[75] and 4) The plaintiff had failed to prove proximate causation by OPEC of the actual cost of gasoline at a domestic service station.[76]

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67. *See* Int'l Ass'n of Machinists v. Org. of the Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1979).

68. At the time of the suit, OPEC consisted of 13 member nations: Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and Venezuela. Ecuador and Gabon are no longer members. *See* OPEC Booklet, *supra* note 6, at 12-13; *see also supra* notes 18-19.

69. Int'l Ass'n of Machinists, *supra* note 67, at 558.

70. *Id.* at 559-60.

71. *See generally* Int'l Ass'n of Machinists, *supra* note 67.

72. *Id.* at 560.

73. 28 U.S.C. § 1602. The court also stated that OPEC could not be served under the International Organizations Immunities Act (22 U.S.C. § 288), because the United States does not participate in OPEC, as is required under the act. Int'l Ass'n of Machinists, *supra* note 67, at 560.

74. Int'l Ass'n of Machinists, *supra* note 67, at 560-61 (*citing* Illinois Brick Co. v. Illinois, 432 U.S. 720 (1977) (where Court held that a plaintiff in a price-fixing case must have purchased directly from the alleged price-fixer in order to recover).

75. Int'l Ass'n of Machinists, *supra* note 67, at 570-72.

76. *Id.* at 573 (finding there were dramatic increases in the price of crude oil between 1973-1974 and 1978-1979, but that the plaintiffs failed to show OPEC's actions were a substantial factor therein).

In the conclusion of the opinion, the court eloquently praised the plaintiff for bringing the suit, thereby raising the public's awareness of the issue of domestic energy policy. The court scolded the executive branch for failing to remedy the situation and called upon them to take action. The court also praised certain counsel who submitted

b. On appeal

The case was subsequently appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's judgment in 1981; however, the court relied on different reasoning.[77] Despite the plethora of possible bars to liability, as cited and relied upon by the district court, the Ninth Circuit Court of Appeals limited their focus to the interrelated issues of sovereign immunity and the acts of state doctrine.[78]

In discussing the doctrine of sovereign immunity, the court noted its ideological roots in the long-held belief that each sovereign state is equal to all others, and, therefore, should not be subject to the jurisdiction of other states.[79] The court went on to note that the doctrine had since been limited by an exception for commercial activity,[80] as reflected in the Foreign Sovereign Immunities Act (FSIA).[81] The court also discussed the objective "nature-of-the-act" test (as opposed to the purpose of the act) used to determine if a specific act is commercial in nature, and, therefore, not protected by the sovereign immunity doctrine found in 28 U.S.C. § 1603(d) of the FSIA.[82]

In what appeared a tacit agreement with the appellant's (union's) argument (i.e. that the nature of OPEC's actions, as well as those of the member states, is commercial in nature, therefore stripping them of immunity), the court determined that, while the principles of the FSIA

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briefs and presented oral argument, including, most notably, future Unites States Supreme Court Justice Antonin Scalia. *Id.* at 575.

77. Int'l Ass'n of Machinists v. Org. of the Petroleum Exporting Countries, 649 F.2d 1354, 1355 (9th Cir. 1981).

78. *Id.* at 1357-61.

79. *Id.* at 1357.

80. *Id.*

81. 28 U.S.C. § 1602.

82. Int'l Ass'n of Machinists, *supra* note 77, at 1357. A lively ongoing debate exists as to effect on the immunity afforded international organizations (IOs) by the FSIA, which, in 1976, codified the restrictive theory of foreign sovereign immunity. *See* 28 U.S.C. §§ 1605 *et seq.*; *see also* The Tate Letter, 26 Dep't State Bull. 984 (1952). The restrictive theory, as represented by the FSIA, removes absolute immunity from sovereign states for acts which are commercial in nature. The debate focuses on whether, by enacting the FSIA, Congress intended to restrict the absolute immunity originally conferred to IOs in 1946 under the International Organizations Immunity Act (IOIA), 22 U.S.C. § 288 *et seq.* *See, e.g., Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (holding it was not Congress' intent that the FSIA restrict the immunity provided IOs by the IOIA).

The so-called restrictive theory maintains that, because under the IOIA, IOs were to enjoy the same immunity afforded sovereigns, and because the absolute immunity enjoyed by sovereigns was restricted by the FSIA to acts *jure imperii*, the immunity provided IOs should likewise be reduced. *See, e.g., Broadbent v. Org. of American States*, 628 F.2d 27, 31 (D.C. Cir. 1980) (where plaintiff argued the same and court avoided the question by finding the OAS was immune under either theory).

were still relevant, the act of state doctrine was more apposite.[83] The court went on to discuss, in some detail, the history and purpose of the act of state doctrine, much of which is beyond the scope of this comment.[84]

For the purpose of this comment, it should be sufficient to point out the doctrine is a prudential one, rather than a jurisdictional one, recognizing that it is not always advisable to have matters of foreign relations decided by the courts.[85] The doctrine states that the courts are not to adjudicate politically sensitive issues, which would require them to judge the legality of an act of a sovereign.[86]

The court noted that the act of state doctrine was not limited by the commercial activity exception, as was the FSIA, and that commercial actions can rise to the level of acts of state if they are done for the state's betterment, thereby implicating the doctrine.[87] The court determined that, because the price-fixing actions were taken for the benefit of the public interests of the sovereigns, and because of the highly political sensitivities involved, the act of state doctrine was applicable, and on that ground, affirmed the lower court.[88] The subsequent petition for writ of certiorari to the Supreme Court was denied.[89] Twenty years would pass before another putative plaintiff would emerge to attempt to apply domestic antitrust law to OPEC.

2. Prewitt v. OPEC

In a class action suit initiated by a gas station owner, and after a systematic review of the public announcements and collective actions of OPEC from March of 1998, until January of 2001, Judge Weiner of the Northern District Court of Alabama, found it beyond dispute that "OPEC was created and exists for the express purpose of coordinating, limiting, stabilizing and otherwise controlling crude oil production and export in order to increase its members' revenues."[90] The *Prewitt* court further found—as a direct impact of the collusion of OPEC—the Unites States economy was negatively impacted by approximately $80-$120 million dollars per day, or $26.3-$39.4 billion dollars per year, in exaggerated oil

83. Int'l Ass'n of Machinists, *supra* note 77, at 1358.
84. *Id.* at 1358-59.
85. *Id.* at 1358 (recognizing the need for the U.S. to speak with one voice and to carry out a deliberate and united foreign policy).
86. *Id.* (*citing* Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).
87. *Id.* at 1360.
88. *Id.* at 1361-62.
89. Int'l Ass'n of Machinists v. Org. of the Petroleum Exporting Countries, 454 U.S. 1163 (1982).
90. Prewitt, *supra* note 7, at 2.

costs.[91]

Having determined OPEC was in violation of the Sherman Act, and because OPEC failed to appear and defend itself in the action, the court entered a default judgment against OPEC.[92] The court also provided injunctive relief for Prewitt and the class, barring OPEC from further price-fixing.[93]

Judge Weiner relied on three main points in distinguishing the Ninth Circuit's decision in *International Ass'n of Machinists*.[94] The court first determined OPEC's actions were clearly commercial in nature, and, therefore, immunity under the FSIA was not available.[95]

The court also determined that, because the actions were commercial in nature, the commercial activities exception to the acts of state doctrine[96] applied, and, therefore, OPEC was denied its protection as well.[97] In support of the holding, the court also noted another limitation to the acts of state doctrine.[98] Specifically, the court noted the activities in dispute took place outside of the OPEC member nations' territories (i.e. Vienna, Austria), and so the doctrine was inapplicable.[99] The court further distinguished *International Ass'n of Machinists* by noting that in that case, OPEC had been dismissed from the suit, leaving only the individual countries, whereas in *Prewitt*, OPEC alone was the defendant.[100]

a. Subsequent history of Prewitt v. OPEC

According to Spenser Weber Waller,[101] Professor and Director of the Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law, the case was transferred to the Chief Justice of the Northern District of Alabama, who vacated the default judgment and injunctive relief, and set a briefing schedule for OPEC's motion to

91. *Id.* at 6.
92. *Id.* at 9-10.
93. *Id.*
94. *Id.* at 7-9.
95. *Id.* at 7 (*citing* 28 U.S.C § 1605(2)); *see supra* text accompanying note 82.
96. The court cited the plurality opinion in Alfred Dunhill of London, Inc., v. Republic of Cuba, 425 U.S. 682, 689-99 (1976) (holding that there is an exception to the acts of state doctrine for commercial activities).
97. Prewitt, *supra* note 7, at 8. The court also noted that the acts of state doctrine had been narrowed since Int'l Ass'n of Machinists by W.S. Kirkpatrick v. Environmental Tectonics Corp., 493 U.S. 400 (1990).
98. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).
99. Prewitt, *supra* note 7, at 8.
100. *Id.*
101. For an erudite examination of the FSIA, acts of state doctrine, comity, and their application to OPEC, see Spenser Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105 (Fall 2002) [hereinafter Suing OPEC].

dismiss.[102]

In its motion to dismiss, OPEC argued that the district court lacked personal jurisdiction over the organization due to Prewitt's failure to properly serve notice.[103] The argument was credited by the district court, citing applicable Austrian law, which required OPEC's consent to be served, and, therefore, dismissed the complaint.[104] Prewitt subsequently made a motion to allow alternative service of process.[105] The district court denied the motion, stating that in this case, OPEC could not be effectively served with process.[106] Prewitt subsequently appealed to the Eleventh Circuit Court of Appeals.[107]

The Eleventh Circuit Court of Appeals, applying a *de novo* standard,[108] affirmed the district court's determination that proper service was lacking, and moreover, under the particular circumstances of the case, no proper service was possible.[109] In so holding, the court of appeals noted that service of process on foreign entities by registered mail (the means attempted by Prewitt) is only authorized where foreign law does not prohibit it.[110]

The Eleventh Circuit Court of Appeals concurred with the district court's determination that the headquarters agreement between OPEC and Austria, which had been enacted into law by the Austrian Parliament, had the status of foreign law.[111] The headquarters agreement provided, in relevant part, "the service of legal process . . . shall not take place within the [OPEC] headquarters seat except with the express consent of, and under conditions approved by, the Secretary General [of OPEC]."[112]

Prewitt also appealed the districts court's denial of its motion for alternative service of process under Federal Rule of Civil Procedure 4(f)(3), which was reviewed by the Eleventh Circuit Court of Appeals under an abuse of discretion standard.[113] The Eleventh Circuit Court of Appeals determined it would be a clear affront to Austrian law (i.e. headquarters agreement) to allow alternative service, in violation of

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102. *Id.* at 113.
103. Prewitt, *supra* note 7, at 3.
104. *Id.* at 2.
105. *Id.* at 7.
106. *Id.* at 7-8.
107. *See generally* Prewitt 2, *supra* note 7.
108. *Id.* at 920-21 (*citing* Vencor Hosp., Inc. v. Standard Life & Accident Ins., 279 F.3d 1306, 1308 (11th Cir. 2002)).
109. *Id.* at 919.
110. *Id.* at 923 (*citing* Federal Rule of Civil Procedure 4(f)(C)(ii)).
111. *Id.* at 924 n.13.
112. *Id.* at 923.
113. *Id.* at 921 (*citing* Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002)).

Federal Rule of Civil Procedure 4(f)(3). As the court noted, the 1993 Advisory Committee Note to Federal Rule of Civil Procedure 4(f)(3) provided, in pertinent part, that "an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law."[114]

The Eleventh Circuit Court of Appeals went on to provide it found no abuse of discretion in the district court's denial of Prewitt's motion for alternative service, and went so far as to say it would have been an abuse of discretion to allow alternative service under the circumstances.[115] Following the issuance of the court's opinion, the plaintiff made a motion for rehearing en banc, which was denied.[116] Thereafter, on May 25, 2004, Prewitt filed a writ of certiorari to the Supreme Court, which is currently pending.[117]

The issues raised by the *Prewitt* case are significant and appear ripe for resolution. Although unclear if certiorari will be granted, without further amendment by the Court, the state of the law, at least in the 11th Circuit, provides to OPEC complete immunity from suit—OPEC need only withhold its consent to service in order to effectively preclude the jurisdiction of U.S. courts. Even if, *arguendo*, a suit against OPEC were to be ultimately successful, the enforceability of a money judgment, or more problematic, the enforcement of injunctive relief, combined with the cost of litigation, give potential litigants reason to pause before initiating the next private action against OPEC.[118]

Having briefly discussed U.S. antitrust law, its two attempted applications to OPEC, and the historical defenses to its application, we now turn our attention to an examination of the OPEC member nations' domestic approaches to antitrust. There exists a distinct lack of reliably translated case law from the individual OPEC member nations, and, therefore, the individual member nations' statutes and other codified law are the sole source and focus of the survey which follows.[119]

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114. *Id.* at 927.

115. *Id.* at 928 n.21.

116. *See* Prewitt, *supra* note 7 and accompanying text.

117. Prewitt Enters., Inc. v. Org. of the Petroleum Exporting Countries, 353 F.3d. 916 (11th Cir. 2003), *petition for cert. filed*, U.S.L.W. (U.S. May 25, 2004) (No. 03-1592).

118. Suing OPEC, *supra* note 101, at 154-55 (noting the futility of the exercise).

119. Those of my colleagues who have attempted to do similar social and legal research involving nations with unique languages, legal systems and divergent attitudes towards the dissemination of information in general, can empathize with the arduous nature of the task at hand.

IV. 11 Member Nations' Antitrust Law

A. Algeria

Algeria's commercial code[120] and civil code[121] do not address antitrust issues in the same manner as the United States.[122] Although officially a republic,[123] Algeria operates as a socialist state,[124] and, therefore, the state exercises a complete monopoly on foreign trade.[125] Additionally, the state controls the price of goods that travel in foreign commerce.[126]

Algeria's economy is not based on the precept of fair competition, and accordingly, with respect to its actions with OPEC, Algeria cannot be said to act inconsistently with its domestic approach to antitrust. Its lack of privatized industry negates the need for controls on anticompetitive actions by market participants. The government itself is a de facto monopoly, and as such, does not engage in contradictory action through its membership in the world's largest international oil cartel.

B. Indonesia

Indonesia's economy is currently in a transitional phase, where, in addition to trying to stabilize after its recent economic crisis, the government is relaxing its regulation of the economy in favor of greater private autonomy, while at the same time, trying to prevent the formation of monopolies.[127] Before passing its comprehensive competition law,[128]

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120. COMMERCIAL CODE (Algeria), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1981) [hereinafter ALGERIA COMM. CODE].

121. CIVIL CODE (Algeria), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1988) [hereinafter ALGERIA CIV. CODE].

122. *See* ALGERIA COMM. CODE, *supra* note 120; *see also* ALGERIA CIV. CODE, *supra* note 121.

123. *See* Central Intelligence Agency, *The World Fact Book- Algeria*, *available at* http://www.odci.gov/cia/publications/factbook/geos/sy.html#Govt (last visited Sept. 6, 2004) [hereinafter CIA].

124. ALG. CONST. art. 195 (stating the "socialist choice" cannot be changed by amendment).

125. LAW NO. 78-02, LAW PROVIDING FOR STATE MONOPOLY OF EXTERNAL TRADE (Algeria), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1988) [hereinafter ALG. MONOPOLY LAW].

126. *Id.* at art. 6(4).

127. Norman S. Pakpahan, *Competition Law and Policy In Indonesia: An Agenda for Economic Law Reform*, *in* COMPETITION REGULATION IN THE PACIFIC RIM 151, 154 (Carl J. Green, Douglas E. Rosenthal eds., 1996) [hereinafter Indonesia Economic Law Reform].

During his 32-year tenure, Suharto and his family are credited with amassing a $25 billion dollar empire, largely from kickbacks and pilfering. Jared Levinson, *"Living*

Indonesia did not have substantially similar laws as part of its statutory compilations. It did, however, have several references to competition scattered throughout various enactments, as well as a proposed draft of a comprehensive competition bill.[129]

One such reference, proscribing monopolistic practices, was included in the State Policy Guidelines, which detailed several conditions Indonesia wished to avoid while emerging into a more privatized economy.[130] Additionally, Article 382 of Indonesia's Criminal Code specifically proscribes unfair competition through misleading the public in order to make gain or expanding the results of trade.[131]

Another example of Indonesia's increased concern for, and attention to, antitrust issues in the early 1990's, is reflected in their company law.[132] Law Number 1 of 1995 requires all formations and mergers of companies to "observe the interests of the public and fair competition in business."[133] This provision was further expounded upon by the elucidation to the law,[134] which provides that business combinations that form a monopoly are illegal if they would entail a loss to the public.[135]

While the various aforementioned enactments represented a piecemeal patchwork of antitrust provisions, generally seeking to prevent monopolies and other anticompetitive actions, a comprehensive competition law was eventually enacted in 1999.[136] The Indonesian Monopoly Law[137] has been criticized as being prematurely forced onto a country that did not have the ideological underpinnings in place essential for such a law to be meaningful and effective.[138] Additional criticism of

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Dangerously": Indonesia and the Reality of the Global Economic System, 7 D.C.L.J. INT'L L. & PRAC. 425, 431 (1998). For a detailed discussion of the crisis and its causes (including Suharto's "crony capitalism"), see *id.*

128. Undang-Undang Republik Indonesia Nomor 5 Tahun 1999, Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat (*translated as* Republic of Indonesia Law No. 5 of 1999, Concerning the Prohibition of Monopolistic Practices and Unhealthy Business Competition) [hereinafter INDONESIA MONOPOLY LAW].

129. Indonesia Economic Law Reform, *supra* note 127, at 154.

130. *Id.* at 155-56 (*quoting* The Republic of Indonesia State Guidelines, 1993. BP-7 Pusat 1994 (p.55) "Unfair and unhealthy competition through monopolization of economic activities at the expense of the people. Monopoly, oligopoly and monopsony are inimicable to social justice.").

131. Indonesia Economic Law Reform, *supra* note 127, at 159; *see also id.* at 159 n.14.

132. *See id.* at 162.

133. *Id.* at 162 (*quoting* Law 1/1995, art. 104(1)(b) (Indonesia)); *see id.* at 162 n.20.

134. *Id.* at 163 (stating that the elucidations to the law have the same binding legal force as the law itself).

135. *Id.* at 163; *see also id.* at 163 n.21 (*citing* Elucidation, Law 1.1995 art. 104, Paragraph (1)).

136. INDONESIA MONOPOLY LAW, *supra* note 128.

137. *Id.*

138. James Soemijantoro Wilson, Note, *Why Foreign Aid Fails: Lessons from*

the law has included the fact that the body charged with enforcement of the law has no independence from the executive, who has the power to direct its enforcements and to exempt public and private entities from the law entirely.[139]

While these criticisms of the law are well founded, they are somewhat shortsighted. The Indonesian Monopoly Law represents only the first comprehensive attempt at competition regulation within Indonesia.[140] The law can be amended, rewritten or supplemented, as needed, in order to effectuate its aims. Additionally, the law will help bring national focus to the underlying values it presupposes, and, thereby, accelerate the further development of those very values.[141]

In light of Indonesia's antitrust laws, when Indonesia acts as part of the OPEC oil cartel, it is acting in an ideologically inconsistent manner with the economic policies it is attempting to embrace. While its existing laws do not expressly prohibit its participation in the collusive actions of OPEC, there can be no doubt its actions, through OPEC, are in diametric opposition to the precepts of fair trade and competition—the very policies it is attempting to instill in its own economy. As Indonesia continues to move towards an economic model that is more deeply rooted in fair competition, its inconsistent actions with OPEC will become more and more transparent and pronounced.

C. Iran

Iran's commercial law[142] and civil code[143] do not discuss antitrust issues.[144] Iran has nationalized most of its industry, including oil, gas, railroads, electricity, fisheries, metallurgy, ship and airplane building, and mining.[145] While private ownership of non-controlled businesses is

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Indonesia's Economic Collapse, 33 LAW & POL'Y INT'L BUS. 145, 166-67 (2001).

139. *Id.* at 167 n.101.

140. *See* INDONESIA MONOPOLY LAW, *supra* note 128.

141. Despite a conscientious attempt, which included several visits to, and searches of, the unparalleled resources of the United States Library of Congress, at the time of this writing, the author was unable to procure a translated copy of Undang-Undang Republik Indonesia Nomor 5 Tahun 1999, Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat (*translated as* Republic of Indonesia Law No. 5 of 1999, Concerning the Prohibition of Monopolistic Practices and Unhealthy Business Competition), *supra* note 128. Accordingly, a more detailed examination of its provisions was, unfortunately, not possible.

142. COMMERCIAL LAW (Iran), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1982) [hereinafter IRAN COMM. LAW].

143. CIVIL CODE (Iran), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1982) [hereinafter IRAN CIVIL CODE].

144. *See* IRAN COMM. LAW, *supra* note 142; *see also* IRAN CIVIL CODE, *supra* note 143.

145. LAW NO. 7/226, LAW ON PROTECTION AND DEVELOPMENT OF IRANIAN

recognized,[146] based upon the lack of treatment in Iran's codifications, it appears collusive actions are not practiced in Iran. Accordingly, Iran's actions through OPEC are not inconsistent with its domestic approach, or lack thereof, to antitrust.

D. Iraq

With the fall of Saddam Hussein's regime in the winter of 2003, the development of the Governing Council, and the early transfer of power on June 28, 2004,[147] to the provisional Iraqi government,[148] Iraq's laws are in a state of flux. The form they will eventually take may or may not reflect the democratic influences of the U.S. and the other coalition members. However, the manner in which they are decided upon, instituted, and enforced, will undoubtedly be a dramatic departure from the dictatorial nature seen under the former regime.

Although the future of Iraq's economic enactments is quite unclear, the laws under Saddam created a scheme of government mandated price control.[149] Merchants were forbidden from selling commodities at prices above or below a set price decided upon by the government.[150]

This type of economic control by the government, similar to that used by Nigeria, discussed *infra*, effectively eliminates price-fixing by market participants. Additionally, it is unlikely companies would be allowed to create monopolies without state sanction in such a socio-political environment, although the issue was not addressed directly in Iraq's codifications.[151]

Iraqi law addresses something referred to as "unfair competition;" however, Iraq's law does not use the term in the same sense it is used in the United States. For instance, under Iraq's commercial laws, Iraqi merchants are forbidden from using another's trade name(s), violating patents, and "stealing" another's employees or trade secrets.[152] Owing to the fact Iraq's laws do not presently address antitrust issues in the same manner as those of the U.S., Iraq cannot be said to act in an inconsistent

INDUSTRIES art. 1(a-b) (Iran), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1982).

146. *Id.* at art. 1(d).

147. *See* George Melloan, *Allawi's Accession Changes the Game in Iraq*, WALL STREET JOURNAL, June 29, 2004, at A15.

148. *See* Robin Wright and Rajiv Chandrasekaran, *U.S. Seeks Compromise Plan for Iraqi Political Transition*, WASHINGTON POST, Dec. 16, 2003, at A30.

149. COMMERCIAL LAW art. 8 (Iraq), *translated in* BUSINESS LAWS OF IRAQ—VOLUME II (Nicola H. Karam ed., 1990).

150. *Id.*

151. *See id.*

152. *Id.* at art. 98(1-2).

manner with its domestic approach when acting through OPEC.[153] If Iraq eventually embraces an open political system, replete with an open market economy, market conditions may subsequently require Iraq to address antitrust issues directly. Until then, its further participation in OPEC will not directly contradict its domestic policy towards antitrust.

As has been seen in the unrest following the largely uneventful overthrow of Saddam, Iraq can be an enigma. Another uncertainty is the future affect the U.S.'s influence will have with regard to Iraq's oil production, and how it may, or may not, impact Iraq's continued membership in OPEC.

E. Kuwait

Like Iran and Iraq, Kuwait's Commercial Code[154] does not address antitrust law in the same sense as the United States. Kuwaiti law proscribes fraud and cheating in the sale of goods,[155] the giving of false information about the origin and quality of goods,[156] as well as "stealing" employees away from a competitor.[157]

An argument could be made that collusion is a form of fraud or cheating, and, therefore, represents an inconsistency between Kuwait's domestic policies and its actions through OPEC. However, that argument is tenuous at best and was not contemplated by Kuwait's various enactments. Therefore, because Kuwaiti law does not embrace antitrust, they too cannot be said to act contrary to their domestic laws when acting through OPEC.

F. Libya

Libya's official gazette is published solely in Arabic.[158] A search of the records of the Library of Congress, as well as consultations with its

153. It will be interesting to watch Iraq as it emerges from the Saddam years, with so much of its future unclear, including its continued participation in OPEC. It would not be beyond the realm of possibility for the U.S. to utilize its present position of influence in Iraqi affairs, albeit a temporal one, to suggest that Iraq withdraw from OPEC.

Such a departure would significantly reduce OPEC's collective power and would strike what would most likely be a demoralizing blow to the organization, as Iraq was host of the conference that spawned OPEC. *See supra* note 14. Additionally, the flow of Iraqi oil into the world market—unimpeded by OPEC's production limitations—would generate badly needed capital for Iraq, while at the same time, reduce global oil prices.

154. COMMERCIAL CODE (Kuwait), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1989).

155. *Id.* at art. 56.

156. *Id.* at art. 57.

157. *Id.*

158. *See* al-Jarida al-rasmiyah (Libyan gazette, published sporadically in Arabic from Sept. 24, 1969, to-date).

Middle East and North African Legal Specialist, revealed no translations into English. Accordingly, it was not possible to include the domestic laws of Libya in this survey. However, given its tumultuous history and underdeveloped economy,[159] it is unlikely to have considered antitrust issues with any specificity.

G. Nigeria

Nigeria's approach to price control is the opposite of what would be imagined in the United States. As previously noted, the economic policies of the U.S. promote competition among individual merchants and corporations alike, each striving to develop a less costly product so as to undersell the competition. Nigeria's economic policy is one of price limitation, not unlike Iraq's under Saddam, discussed *supra*, where prices are controlled through governmental mandates and not through the rigors of fair competition among market participants.[160]

In its Price Control Act,[161] Nigeria has identified certain goods[162]—many of which represent common staples of life—which cannot be sold for more than their government-assigned sale price.[163] Additionally, the act forbids the hoarding of the enumerated controlled goods.[164] The act appears to be directed primarily at individual merchants,[165] although a provision is included in the enactment that encompasses corporations.[166] Nigeria, therefore, cannot be said to act in an inconsistent manner when it acts through OPEC.

H. Qatar

The civil[167] and commercial[168] codes of Qatar are devoid of

159. *See* CIA-Libya, *supra* note 123, *available at* http://www.cia.gov/cia/publications/factbook/geos/ly.html (last visited Jan. 14, 2004).

160. PRICE CONTROL ACT, Chapter 365, sect. 6 (Nig.) [hereinafter PRICE CONTROL ACT].

161. *Id.* at Chapter 365.

162. Nigeria's price controlled commodities include: bicycles and parts; flour; matches; milk; motorcycles and parts; motor vehicles and parts; petroleum products; salt; and sugar. *Id.* at Chapter 365, First Schedule.

163. *Id.* at Chapter 365, sects. 4-6.

164. *Id.* at Chapter 365, sect. 7.

165. *Id.* at Chapter 365, sect. 6(1) ("It shall be unlawful for any *person* to sell . . . any controlled commodity at a price which exceeds the controlled price.") (emphasis provided).

166. *Id.* at Chapter 365, sect. 14.

167. CIVIL CODE (Qatar), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1989) [hereinafter QATAR CIV. CODE].

168. COMMERCIAL CODE (Qatar), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1989) [hereinafter QATAR COMM. CODE].

provisions similar to U.S. antitrust laws.[169] When examining the enactments, it becomes clear the focus is not the proscription of collusive action, but rather, regulating the independent actions of individual merchants.[170] Qatar's unfair competition article reads, in relevant part: "A merchant shall not resort to deceit or fraud in marketing his goods and he shall not disseminate false statements which may prejudice the interests of a competitor merchant; in default he shall be liable for damages."[171]

As mentioned previously, an argument could be posited whereby the aforementioned enactment could be applied to a situation where a merchant acts in collusion with others to artificially inflate the price of a good. However, the law is concerned with merchants who make false claims about the quality of their goods or the goods of other merchants. It would be an extremely awkward interpretation of Qatar's unfair competition law to argue it applies to collusion or other anticompetitive acts. In addition to the aforementioned provision, Qatar's Commercial Code also contains articles prohibiting the use of other merchants' trade names,[172] making false statements about the origin of goods, or other misleading practices, "theft" of other merchants' clients,[173] or "theft" of a competitor's employees in order to obtain his clients and/or trade secrets.[174]

From Qatar's lack of statutory treatment of antitrust, it appears collusion, monopolies and other anticompetitive actions, do not occur or are not seen as negative practices. Regardless, Qatar does not act inconsistently with its domestic economic laws and policies when it acts through OPEC.

I. Saudi Arabia

Saudi Arabia's Commercial Code[175] permits companies to work together as co-operative corporations;[176] however, only if their aim is to *reduce* the cost, purchase price, or sale price of an item, or to improve the quality of a product or the quality of a service.[177] The commercial code does not detail the types of practices that are permissible, but,

169. 15 U.S.C. §§ 1-7 (2000).
170. *See* QATAR CIV. CODE, *supra* note 167; *see also* QATAR COMM. CODE, *supra* note 168.
171. QATAR COMM. CODE, *supra* note 168, at art. 243.
172. *Id.* at art. 242.
173. *Id.* at art. 244.
174. *Id.* at art. 245.
175. COMMERCIAL CODE (Saudi Arabia), *translated in* BUSINESS LAWS OF SAUDI ARABIA (Nicola H. Karam ed., 1977) [hereinafter SAUDI COMM. CODE].
176. *Id.* at COMPANIES LAW, art. 189.
177. *Id.* at COMPANIES LAW, art. 189 (1-2) (emphasis provided).

rather, refers only to "co-operative principles."[178] It is clear under the law, however, that the co-operative groups would not be permitted to artificially *increase* the price of the good or service through "cooperative principles."[179]

The commercial code explicitly proscribes conduct inconsistent with the precepts of Islam,[180] as well as acts of cheating, falsification,[181] fraud, parsimony, duplicity, or the super-generic proscription of "any wrongful act."[182] Again, the collusion of the OPEC member nations to tailor oil production so as to inflate its price, could be considered a form of "cheating;" thereby, allowing the member nations to effectively strong-arm their reluctant customers into paying inflated prices. The key role played by oil—and its many byproducts—in today's economy cannot be overstated, and is underscored by OPEC member nation Nigeria's controlling of its maximum domestic price.[183]

If OPEC's actions do qualify as "cheating," clearly a highly subjective notion, it could be argued Saudi Arabia engages in inconsistent conduct by proscribing behavior it engages in through its participation in OPEC. In the absence of specific antitrust laws, the aforementioned interpretation of "cheating" is far too attenuated. Accordingly, it cannot be said Saudi Arabia acts in an inconsistent manner with its domestic provisions when it participates with OPEC.

J. United Arab Emirates

The domestic laws of the United Arab Emirates (U.A.E.), like Algeria, Iran, Iraq, Kuwait, Nigeria, Qatar and Saudi Arabia, discussed *supra*, do not address antitrust directly in their commercial code.[184] Like Qatar, the U.A.E. addresses "unfair competition," and, like Qatar, the

178. *Id.* at COMPANIES LAW, art. 189 ("Joint stock companies or limited liability companies may be incorporated *according to co-operative principles*, if, by the common endeavors of all the partners and in their interests. . . .") (emphasis provided).

179. *Id.* at COMPANIES LAW, art. 189 (1).

180. A discussion of the precepts of Islam is beyond the scope of this comment.

181. *See generally* LAW TO COMBAT COMMERCIAL FRAUD arts. 1-2 (Saudi Arabia), *translated in* BUSINESS LAWS OF SAUDI ARABIA—VOLUME II (Nicola H. Karam ed., 2000) (prohibiting the falsification of the identity, nature, kind, origin, weight, quality of goods, as well as deceptive advertising of goods).

182. SAUDI COMM. CODE, *supra* note 175, at COMMERCIAL LAW, art. 5.

183. PRICE CONTROL ACT, *supra* note 160, at Chapter 365, First Schedule; *see supra* note 162 (detailing the specifically controlled commodities).

184. *See* COMMERCIAL CODE (United Arab Emirates), *translated in* THE LAW OF COMMERCIAL PROCEDURE OF THE UNITED ARAB EMIRATES (Dawoud Sudqi El Alami, 1994) [hereinafter U.A.E. COMM. CODE].

Antitrust is also not discussed in the U.A.E.'s COMPANIES LAW. *See* FEDERAL LAW NO. 8 OF 1984 REGARDING COMMERCIAL COMPANIES (United Arab Emirates), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1987).

proscribed conduct includes "theft" of employees, customers, or trade secrets.[185]

The code also proscribes dissemination of false information relating to the origin or quality of goods, as well as the trader's qualifications.[186] Additionally, a trader is not to use methods of fraud or deceit to sell goods, or to spread falsehoods about a competitor to the competitor's detriment.[187]

These provisions do not encompass collusion among market participants, except by the most strained reading of "fraud." It would seem the U.A.E. does not suffer from the ills of collusion, or does not see collusion as a negative element of its economy. Regardless, through its participation in OPEC, the U.A.E. does not engage in a course of conduct it proscribes for its citizenry.

K. Venezuela

Venezuela is the second of the surveyed OPEC member nations to enact specific antitrust legislation.[188] Venezuela's antitrust law[189] states as its objective: "the promotion and protection of the exercise of free competition, and the prohibition of monopolies and other practices that restrict, impede, or limit economic freedom."[190] The law is applicable to persons and companies, both public and private, who are engaged in economic activity within the country.[191] The law generally prohibits any conduct, practice, agreement, convention, contract or decision that impedes, restricts, falsifies, or otherwise limits free competition.[192]

More specifically, the law prohibits "all actions designed to restrict free competition,"[193] as well as "all conduct intended to manipulate

185. U.A.E. COMM. CODE, *supra* note 184, at art. 64.

186. *Id.* at art. 65.

187. *Id.* at art. 66; *see generally* SUPPRESSION OF FRAUD AND DECEIT IN COMMERCIAL TRANSACTIONS art. 1 (United Arab Emirates), *translated in* COMMERCIAL LAWS OF THE MIDDLE EAST (Allen P.K. Keesee ed., 1982) (outlawing "cheating" by falsifying the number, quality, etc., of goods sold).

188. The other OPEC member nation to directly address antitrust was Indonesia, discussed *supra*.

189. Ley Para Promover y Protegar el Ejercicio de la Libre Competercia de 13 Dec. 1991 (translated as "Law to Promote and Protect the Exercise of Free Competition") Gaceta Official 26 Feb. 1992 (*translation available at* http://www.procompetencia.gov.ve/lppelc-eng.html) (last visited Sept. 6, 2004) [hereinafter VEN. ANTITRUST LAW].

190. *Id.* at art. 1.

191. *Id.* at art. 4. An exception is made for anticompetitive practices which have been approved by the government, provided the activity is, *inter alia*, for the benefit of consumers and users. *Id.* at art. 18.

192. *Id.* at art. 5.

193. *Id.* at art. 7.

factors of production, distribution, technological innovation, or investments, in such a way as to be detrimental to free competition."[194] The law also specifically forbids "agreements or conventions entered into directly or indirectly . . . which restrict or impede competition between their members."[195] Not surprisingly, agreements to fix prices, as well as agreements to limit production to affect a product's price, are also specifically proscribed.[196]

Through its membership in OPEC (an organization which openly and unabashedly rejects free competition in the global oil market and tailors production in order to fix prices at artificially high levels), Venezuela seems to reject its declared ideals of free competition and economic freedom in favor of collusion and patently anticompetitive actions. Indeed, one can scarcely envision two more diametrically opposed economic policies.

The Venezuelan Antitrust Law[197] is admittedly inapplicable to the government of Venezuela for at least three reasons. First, under Venezuela's Antitrust Law, the economic activity at issue must be done within Venezuela,[198] which is not the case when Venezuela acts through OPEC, headquartered in Vienna, Austria. Second is an exception to the law which allows the government to approve anticompetitive actions which satisfy several requirements.[199] Lastly, Venezuela has nationalized its oil industry and so has a *de facto* monopoly over it.[200] Nonetheless, Venezuela's marked departure from its declared ideal economic landscape, replete with vigorous competition among its market participants, does seem to evidence a certain degree of hypocrisy.[201]

Perhaps Venezuela's leaders have determined the economic benefits of increased oil revenue, through its collusion with OPEC, outweigh any uneasiness generated from such transparent inconsistency with its domestic approach to antitrust. Similarly, Venezuela's policy creators

194. *Id.* at art. 8.
195. *Id.* at art. 9.
196. *Id.* at art. 10.
197. *See supra* note 189.
198. *Id.* at art. 4.
199. *Id.* at art. 18.
200. JULIAN O. VON KALINOWSKI, WORLD LAW OF COMPETITION, sec. 1.01 (1986). For a detailed discussion of the history of Venezuelan antitrust law, see GUSTAVO BRILLEMBOURG, VENEZUELAN LAW GOVERNING RESTRICTIVE BUSINESS PRINCIPLES (1985).
201. Of course, every nation has an inherent and assumed right to act in its own perceived best interests, including the determination of which industries should be owned and/or otherwise controlled by the government. *See, e.g.*, Paul Steven Dempsey, *Competition in the Air: European Union Regulation of Commercial Aviation*, 66 J. AIR L. & COM. 979, 983-84 (Summer 2001) (noting the relaxation of the European Union member nations' governmental control of the airline industry).

may have determined the economic benefits from increased oil revenues outweigh the benefits of political goodwill which would undoubtedly flow to Venezuela by its withdrawal from OPEC and its pursuit of a more consistent approach to free competition in the global oil market.

V. Conclusion

The collusive actions of OPEC, notwithstanding its apparent immunity from personal jurisdiction, are a clear violation of U.S. antitrust law. Although two cases have been initiated in U.S. courts against OPEC, each has been decided in OPEC's favor, both at trial and on appeal. The issues presented in the *Prewitt* case are of national significance and the various U.S. courts are in need of definitive guidance from the Supreme Court. If the Court denies certiorari, the practical effect will be that OPEC will enjoy complete immunity from suit in U.S. courts, simply through withholding its consent to service.

Due to the U.S.'s oil production/consumption deficit, the U.S. must import oil to satisfy its demand, approximately half of which is imported from member nations of OPEC.[202] The oil imported into the U.S. reflects a price that has been artificially increased through OPEC's collective oil production limitations.

After providing an overview of the U.S.'s antitrust laws, this comment sought to survey the eleven OPEC member nations' domestic approaches to antitrust in order to determine if they act consistently with their domestic approaches to antitrust. Of the ten OPEC member nations whose laws were available to be examined,[203] only Indonesia and Venezuela have promulgated laws that specifically address antitrust issues.[204]

The remaining eight countries[205] have nationalized economies, or parts thereof,[206] state-controlled prices,[207] or have no applicable provisions.[208] These eight countries cannot be said to act inconsistently

202. *See supra* notes 3-5.

203. Libya was not a part of the survey due to the unavailability of English translations of Libyan laws, despite a search of the United States Library of Congress' collection, as well as discussions with the Library's Middle East and North African Legal Specialist.

204. *See supra* discussion section IV(A-K).

205. These include: Algeria, Iran, Iraq, Kuwait, Nigeria, Qatar, Saudi Arabia and the United Arab Emirates.

206. These include: Algeria (state monopoly of foreign trade, state controlled prices), Iran (nationalized many industries), and Venezuela (although has antitrust legislation, has nationalized oil industry).

207. These include: Algeria (state price control), Iraq (future unclear, state price control under Saddam), and Nigeria (state price control).

208. These include: Algeria, Iran, Iraq, Kuwait, Nigeria, Qatar, Saudi Arabia, and the United Arab Emirates.

with their domestic approaches to antitrust when they act as part of the OPEC oil cartel.

The same cannot be said, however, for Indonesia, and especially Venezuela, which has the more developed antitrust position of the two. Both Indonesia[209] and Venezuela[210] directly prohibit monopolies and other anticompetitive practices, yet each participates in the world's largest oil cartel. While neither country violates their respective domestic laws through their participation in OPEC, each acts with a certain degree of inconsistency with the economic mores each country purports to embrace.

While OPEC's collusion has negatively impacted global petroleum prices for forty-four years, in the long-term, the eventual dissolution of OPEC is unavoidable. If by no other means, OPEC will eventually disband when the oil pumps fail, for oil is a finite and non-renewable resource.[211] In the short-term, the U.S., and all other oil importing nations, should deliberately concentrate on developing economically viable renewable alternatives to petroleum. By eliminating the U.S.'s dependence on oil, the nation would be strategically safer, environmentally sounder, and its economy would be free of OPEC's parasitic effects.[212]

209. *See supra* note 128.

210. *See supra* note 189.

211. Gary D. Meyers & Simone C. Muller, *The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy*, 4 BUF. ENVTL. L.J. 1, 41-42 (1996) (advocating a transition of dependence from non-renewable fossil fuels to renewable sources for energy production).

212. The deleterious effects of the U.S.'s petroleum dependency will only be exasperated in the future by the emerging economies of nations such as China, whose already robust demand for petroleum will increase dramatically as its economy develops into its full potential. *See* Timothy L. Fort, Cindy A. Schipani, *Ecology and Violence: The Environmental Dimensions of War*, 29 COLUM. J. ENVTL. L. 243, 248-49 (2004) (noting China's economic growth of 93% between 1990 and 1996, as well as the roughly 3.5% annual increase in petroleum demand, especially from China and Latin America, as those economies develop and industrialize).