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This Article analyzes the proposed "No Oil Producing and Exporting Cartels Act of 2019" (NOPEC). This legislation, which was introduced in the United States Senate and House of Representatives, addresses the antitrust issues involved in suing the Organization of the Petroleum Exporting Countries (OPEC), their member states and their state owned oil companies (SOEs), other states and their SOEs, and private companies for their participation in an international cartel that has long been involved in regulating the production and distribution of oil and other petroleum products.[1]

It is our view that this proposed legislation provides a relatively moderate approach to applying U.S. antitrust law to the activities of the likely participants in this cartel. The legislation does not completely cure all the legal problems, but it does remove substantial roadblocks that have allowed this cartel to operate in disregard of U.S. antitrust law.

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[1] The NOPEC bill version analyzed in this article is attached as Appendix A.

INTRODUCTION

Ever since OPEC was formed in 1960, there have been concerns about whether the coordinated efforts of major oil producing countries would affect the markets for oil and other petroleum products in the same way as other cartels affect their markets—by restricting output and raising price above the competitive level—thereby harming consumers. These concerns have only grown over time, as more countries joined OPEC and as OPEC became an effective vehicle for controlling the output of what would otherwise have been competing oil producers.

U.S. antitrust law has always taken a dim view of price fixing cartels. Condemned as illegal from the very earliest days of the antitrust laws in the 19th century, price fixing was formally declared to be "*per se*" unlawful more than seventy-five years ago. This condemnation has been applied not just to domestic cartels, but to international cartels as well. The United States Department of Justice ("DOJ") has pursued a policy of prosecuting international cartels since the late 1930s, and with particular vigor in the 21st century. Justice Scalia expressed this policy view succinctly, when he wrote for the Supreme Court in 2004 that collusion with regard to price is "the supreme evil of antitrust."[2]

Despite this widely held view, the DOJ has not brought an antitrust suit against OPEC, its members, or other firms or countries involved in the oil cartel. Private parties have attempted to do so, but their suits have failed. Courts have applied several substantive law doctrines—comity, Act of State, and the Foreign Sovereign Immunities Act—as well as rules on service of process under the Federal Rules of Civil procedure, to turn away the four private cases that have been filed.

NOPEC is directed at removing the substantive defenses that have blocked the private party litigation and that might block litigation filed by the DOJ. The bill removes those blocks, although an issue might remain if the DOJ brings a criminal prosecution. The bill does not address the procedural issue of service of process. Depending on how the litigation is framed, the service of process issue could affect the outcome of the litigation.

NOPEC gives the DOJ the exclusive right to enforce NOPEC. This means the DOJ would retain its discretion as to

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[2] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

whether to prosecute criminally or to sue civilly. It also retains its discretion to take no action, a decision that would not be subject to any legal review.

Applying the antitrust laws to participants in the international oil cartel would be consistent with long-standing antitrust enforcement policy. It is difficult to see why, as an antitrust matter, oil should be treated differently than potash, lysine, vitamins, airline transportation, computer chips, auto parts, or any of the other diverse international industries whose price fixing activities have been the subject of antitrust litigation when consumers and businesses in the United States have been harmed.

In the past, foreign countries have not always been happy about the United States applying its antitrust laws to cartels formed or operated in their countries. Early efforts to resist that enforcement, however, have largely given way to foreign countries embracing competition, engaging in law enforcement against international cartels, and even accepting the imprisonment of their nationals in U.S. jails. While asymmetric retaliation from foreign countries outside the competition law system is certainly possible, there is no history of such retaliation against U.S. antitrust enforcement, even in the context of the private litigation brought directly against OPEC and state-owned oil companies. Consequently, concerns with retaliation as a result of antitrust action by the United States are misplaced.

The rationale for NOPEC is straightforward: the DOJ should have the opportunity to treat the oil cartel as it treats all others. The DOJ will still be required to choose the proper defendants and to prove the parties agreed to fix prices or output (which will require investigation, including discovery of documents). The DOJ would also clearly need to take account of the foreign policy implications of such litigation, a matter that would require consultation with other departments within the Executive Branch, which might include the President.

NOPEC reserves the decision to the DOJ's discretion as to whether to file suit. NOPEC is an enabling measure. The DOJ would still retain prosecutorial discretion in determining whether to bring suit.

POTENTIAL PARTIES AND THE PROPOSED LEGISLATION

A. OPEC and the Oil Cartel

OPEC is an organization comprised of 17 member countries.[3] The principal aim of OPEC 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," including the "stabilization" of international oil prices.[4]

OPEC wields control over oil markets in a variety of ways and in a variety of instances throughout its history. The most notable example occurred in the 1970s during the Arab-Israeli War. OPEC used its market power to punish the U.S. for its support of Israel. As a result, oil prices surged and spot shortages of gasoline occurred throughout the United States.

OPEC has not always exercised its market power to *increase* prices. It is widely believed in the American oil industry that OPEC's move in late 2014 to allow market prices for oil to fall drastically was designed to curtail expansion of shale oil production in North America.[5] From 2015 to 2018, over 160 North American exploration and production companies filed for bankruptcy, Exxon Mobil and Chevron's stocks underperformed, and over 230,000 U.S. oil workers lost their jobs.[6]

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[3] Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela created OPEC in 1960. These "Founding" members eventually would be joined by other "full" members. Member countries currently include: Algeria, Angola, Ecuador, Equatorial Guinea, Gabon, Iran, Iraq, Kuwait, Libya, Nigeria, the Republic of the Congo, Saudi Arabia (the de facto leader), United Arab Emirates, and Venezuela. Qatar exited OPEC in late 2018 both to focus on liquefied natural gas (LNG) production, and as a result of the increasing effort to pass the NOPEC legislation. Indonesia has become a net oil importer and has suspended its membership.

[4] ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES, *OPEC Statute*, ch.1, art. 2, at 1 (2012), https://www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC_Statute.pdf.

[5] *See* Alex Lawler, Amena Bakr & Dmitry Zhdannikov, *Inside OPEC room, Naimi declares price war on U.S. shale oil*, REUTERS (November 28, 2014), https://www.reuters.com/article/us-opec-meeting-shale/inside-opec-room-naimi-declares-price-war-on-u-s-shale-oil-idUSKCN0JC1GK20141128.

[6] *See* Haynes and Boone, LLP, *Oil Patch Bankruptcy Monitor* (Jan. 7, 2019), http://www.haynesboone.com/-

The oil cartel extends beyond OPEC member countries. As OPEC states, "On 1 January 2017 the 24 OPEC and non-OPEC oil producing country participants to the Declaration of Cooperation forged ahead with actions to adjust the total amount of oil produced by around 1.8 mb/d, in order to speed up the drawdown of stocks in a flooded market."[7] The increase in coordination between member and non-member countries adds a new wrinkle to the dynamics of this cartel.

Currently, OPEC controls over 80% of the world's proven oil reserves. Sixty-five percent of the world's proven oil reserves are located in OPEC-member countries in the Middle East.[8] OPEC member countries produce approximately 40 percent of the world's crude oil. OPEC member country oil exports represent about 60 percent of the total petroleum traded internationally.[9]

OPEC also uses spare production capacity to manage oil markets. According to the U.S. Energy Information Administration (EIA):[10]

> The extent to which OPEC member countries utilize their available production capacity is often used as an indicator of the tightness of global oil markets, as well as an indicator of the extent to which OPEC is exerting upward influence on prices. EIA defines spare capacity as the volume of production that can be brought on

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/media/files/energy_bankruptcy_reports/oil_patch_bankruptcy_monitor.ashx ?la=en&hash=D2114D98614039A2D2D5A43A61146B13387AA3AE; *Current Employment Statistics: Oil and Gas Extraction (NAICS Code 201) and Support Activities for Oil and Gas Operations (NAICS Code 213112)*, BUREAU OF LABOR STATISTICS, https://data.bls.gov/cgi-bin/dsrv?ce; *Quarterly Census of Employment and Wages, Drilling oil and gas wells (NAICS 213111)* BUREAU OF LABOR STATISTICS, https://data.bls.gov/cgi-bin/dsrv?en.

[7] *See* ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES, *Declaration of Cooperation*, OPEC (Nov. 30, 2017) https://www.opec.org/opec_web/en/press_room/4696.htm (the non-OPEC oil producing countries, led by the Russian Federation, include Azerbaijan, Kingdom of Bahrain, Brunei Darussalam, Kazakhstan, Malaysia, Mexico, Sultanate of Oman, Republic of Sudan, and Republic of South Sudan).

[8] ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES, *Share of world crude oil reserves* (2017) https://www.opec.org/opec_web/en/data_graphs/330.htm (last visited June 8, 2019).

[9] *Id.*

[10] The U.S. Energy Information Administration (EIA) is the statistical and analytical agency within the U.S. Department of Energy.

within 30 days and sustained for at least 90 days. Saudi Arabia, the largest oil producer within OPEC and the world's largest oil exporter, historically has had the greatest spare capacity. Saudi Arabia has usually kept more than 1.5 - 2 million barrels per day of spare capacity on hand for market management.[11]

Another key player in the OPEC cartel is the national oil companies (NOCs).[12] NOCs are government-owned and controlled corporations that engage in the production, processing, and distribution of hydrocarbons.[13] According to a 2011 World Bank report, "[t]oday national oil companies (NOCs) control approximately 90 percent of the world's oil reserves and 75 percent of production (similar numbers apply to gas), as well as many of the major oil and gas infrastructure systems."[14] NOCs often times act as gatekeepers to bar entry from private oil companies. "[A]n estimated 60 percent of the world's undiscovered reserves lie in countries where NOCs have privileged access to reserves."[15]

B. NOPEC Legislation

NOPEC covers any "foreign state, or any instrumentality or agent of any foreign state" that acts "collectively or in combination with any other foreign state, any instrumentality or agent of any other foreign state, or any other person, whether by cartel or any other association or form of cooperation or joint action."[16] This broad language would include OPEC and OPEC

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[11] U.S. ENERGY INFORMATION ADMINISTRATION, *What Drives Crude Oil Prices?*, https://www.eia.gov/finance/markets/crudeoil/supply-opec.php (Last updated Oct. 8, 2019).

[12] *See* ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES, *Oil & Energy Ministries/NOCs*, https://www.opec.org/opec_web/en/360.htm (last visited Oct. 8, 2019) (a listing of OPEC NOCs can be found here).

[13] Such companies are more generally termed "state owned enterprises" or "SOEs." SOEs have become familiar participants in world trade.

[14] Silvana Tordo et. al, *National Oil Companies and Value Creation* xi (World Bank, Working Paper No. 218, 2011), https://siteresources.worldbank.org/INTOGMC/Resources/9780821388310.pdf.

[15] *Id.*

[16] No Oil Producing and Exporting Cartels Act of 2019, S. 370, 116th Cong. (2019).

non-member states, NOCs, private companies, and the employees or agents of any of them.

Under Section 7A(a) of NOPEC, it will be "illegal" for the covered actors to engage in enumerated actions to fix price and restrain trade in oil, gas, or other petroleum product markets when "such action, combination, or collective action 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."[17] The bill only targets concerted action related to manipulation of oil and derivative markets, not unilateral actions of state actors. Each individual OPEC country and its SOE remains free to produce as much, or as little, oil as desired. The legislation only prohibits *collective* conduct to fix prices or to otherwise engage in anticompetitive behavior.

Section 7A(b) of NOPEC seeks to eliminate the applicability of immunities and exemptions related to coordinated activity by foreign sovereigns and their agents. Specifically, the act strikes the applicability of the Act of State, foreign sovereign compulsion, and political question doctrines by forbidding any court from considering such doctrines as to the conduct covered in Section 7A(a).[18] These doctrines will be discussed in the next section.

Under section 7A(c), "sole authority to bring an action to enforce this section" lies with the Attorney General of the United States.[19] This would preclude enforcement of NOPEC by the Federal Trade Commission, private plaintiffs seeking damages, or State Attorneys General, all of whom are normally able to enforce federal antitrust laws.

C. Previous Litigation Against OPEC Failed Due to Exemptions and Immunities

There have been four previous failed attempts to apply U.S. antitrust law to OPEC. These cases illustrate the difficulties in suing OPEC and the state owned oil companies and validate the need for legislation to fix existing law.

The problems faced in the prior cases fall into three categories: 1) Act of State doctrine and comity concerns 2) service of process under the Foreign Sovereign Immunities Act (FSIA),

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[17] *Id.*
[18] *Id.*
[19] *Id.*

and 3) political question and separation of powers concerns. The summary of cases that follows describes how these doctrines interact and work to destroy any potential suit brought against OPEC, OPEC members, and NOCs.

1. Int'l Ass'n of Machinists & Aerospace Workers v. Org. of the Petroleum Exporting Countries[20]

A labor organization sought to sue OPEC and its member nations for price fixing under Section 1 of the Sherman Act, asserting the cartel was a *per se* violation of Section 1 of the Sherman Act. The union alleged injury due to "the payment of higher prices for gasoline at the service station pumps."[21] The district court dismissed the case against OPEC, holding that OPEC could not be served under FSIA because OPEC is not a foreign sovereign.[22] The court then held that, with respect to member nations, the union members were indirect purchasers and thus could not sue for treble damages under *Illinois Brick*.[23] With respect to injunctive relief, which if granted would have required OPEC to desist from its collusive conduct, the court determined that drilling was not subject to the commercial exception under FSIA because "the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource to wit, crude oil from its territory."[24]

On appeal, the Ninth Circuit affirmed the district court's dismissal of the case against OPEC, but on different grounds. The Court declared that, on the basis of the Act of State doctrine, "a judicial remedy is inappropriate regardless . . . ."[25] The court held the use of the Act of State doctrine appropriate—though not compelled—in this case. It reasoned that the "possibility of insult to the OPEC states and of interference with the efforts of the political branches to seek favorable relations with them" along

[20] *Int'l Ass'n of Machinists & Aerospace Workers v. Org. of the Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal.1979).

[21] *Id.* at 559.

[22] *See* 28 U.S.C. § 1605 (2016) (the FSIA has its own service of process provision).

[23] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)(holding that indirect purchasers lack standing to sue under federal antitrust laws).

[24] *Id.*

[25] *Int'l Ass'n of Machinists & Aerospace Workers v. Org. of the Petroleum Exporting Countries*, 649 F.2d 1354, 1362 (9th Cir. 1981).

with there being "no international consensus condemning cartels," made dismissal under the Act of State doctrine "appropriate."[26]

2. Prewitt Enters. v. Org. of the Petroleum Exporting Countries[27]

Prewitt, an Alabama gasoline station owner, sued OPEC for violation of Section 1 of the Sherman Act. It served OPEC by sending the summons and complaint via registered mail to OPEC's headquarters in Austria. The documents were signed for by OPEC's Human Resource department, which forwarded the documents on to counsel and OPEC's secretary general.

The court held that service was not valid under Rule 4(f)(2)(C)(ii) of the Federal Rules of Civil Procedure,[28] which governs "Service Upon Individuals in a Foreign Country."[29] More specifically, service by registered mail is permitted under the rule "unless prohibited by the foreign country's law."[30] However, the Headquarters Agreement between Austria and OPEC contained a provision stating that service "shall not take place within the headquarters seat except with the express consent of and under conditions approved by the Secretary General."[31] Thus, because Austrian law barred service without consent, OPEC was not effectively served.

The Eleventh Circuit affirmed.[32] It further considered whether Rule 4(f)(3) would permit other means of giving actual notice despite "Austria's direct prohibition of service on OPEC without its consent."[33] The court concluded that such service would be impermissible, referring to the Advisory Committee Notes to Rule 4(f)(3). It also concluded that "failure to obtain OPEC's consent would constitute a substantial affront to Austrian law."[34] Thus, without OPEC's consent, OPEC could not be served.

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[26] *Id.* at 1361.

[27] *Prewitt Enters., Inc. v. Org. of the Petroleum Exporting Countries*, 224 F.R.D. 497 (N.D. Ala. 2002).

[28] FED. R. CIV. P. 4(f)(2)(C)(ii).

[29] *Id.*

[30] *Id.*

[31] *Prewitt Enterprises, Inc.* 224 F.R.D. at 500.

[32] *Prewitt Enters., Inc. v. Org. of the Petroleum Exporting Countries*, 353 F.3d 916, 928 (11th Cir. 2003).

[33] *Id.* at 927.

[34] *Id.*

3. In re Refined Petroleum Products Antitrust Litigation[35]

This case began as a consolidated complaint that sought damages and injunctive relief, this time against OPEC and various NOCs, including Aramco. The district court invoked the Act of State[36] and political question doctrines[37] to dismiss the suits against OPEC and the NOCs.

The Fifth Circuit affirmed.[38] The court applied both the political question and the Act of State doctrines. The court was convinced "that these matters deeply implicate concerns of foreign and defense policy."[39] Given "the Executive Branch's longstanding approach of managing relations with foreign oil-producing states through diplomacy rather than private litigation," the court held that the issue was to remain with the executive branch.[40]

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35 *In re Refined Petroleum Prods. Antitrust Litig.*, 649 F. Supp. 2d 572 (S.D. Tex. 2009).

36 With respect to the Act of State Doctrine, the district court held that the conduct complained of was "in fact, caused by the production decisions of the conspiracy's sovereign members" and that "the actions attributed to the named defendants . . . merely facilitate, enable, and assist the foreign sovereign state members of the conspiracy." This would force the court to rule on the legality of agreements reached by foreign sovereigns. Thus, the Act of State doctrine applied. "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 are products of unilateral deliberation or consultation with others." *Id.* at 586-88.

37 With respect to the political question doctrine, one of the factors involved requires the court to consider "whether it would be possible to decide this case without expressing a lack of respect for the Executive Branch's handling of foreign relations." The district court discussed "over thirty years of public policy statements made by members of the Executive Branch, all reflecting a commitment to cooperation instead of confrontation with foreign sovereign oil-producers." Thus, the complaints posed a non-justiciable political question. *Id.* at 598.

38 *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011).

39 *Id.* at 943.

40 *Id.* at 943.

4. Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries[41]

Freedom Watch, a political interest group, brought suit against OPEC alleging a price fixing conspiracy in violation of the Sherman and Clayton Acts. The district court granted OPEC's motion to dismiss for failure to effect valid service because Freedom Watch's service attempts violated Austrian law, similar to the reasoning in *Prewitt*.[42] On appeal, the court vacated the district court's order and sent the case back to the district court so it could consider whether service on OPEC's U.S. counsel would constitute service "by other means not prohibited by international agreement" under Rule 4(f), such that Freedom Watch could obtain the district court's authorization to so serve—even if in contravention of Austrian law, provided that offense is "minimize[d]."[43]

On remand, the district court found that the text of Rules 4(h)(2) and 4(f)(3) "provides no authorization for service occurring within the United States and seems to explicitly forbid such service absent federal law to the contrary or waiver."[44] The court also resurrected the Austrian Headquarters Agreement, stating that it constituted an "international agreement" that would prohibit service on OPEC's U.S. counsel under Rule 4(f)(3).[45] Thus, the court denied Freedom Watch's request to authorize alternative means of service.

D. Previous NOPEC Proposed Legislation[46]

NOPEC legislation has been introduced into Congress no fewer than twenty-four times since 2000. The language of these bills has remained substantially unchanged, except for the enforcement section. The initial bill allowed for enforcement by the Federal Trade Commission as well as the Department of

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[41] *Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries*, 766 F.3d 74 (D.C. Cir. 2014).

[42] *Id.* at 77.

[43] *Id.* at 83-84.

[44] *Freedom Watch, Inc. v. Org. of Petroleum Exporting Countries*, 107 F. Supp. 3d 134, 137 (D.D.C. 2015).

[45] *Id.* at 138.

[46] *See, e.g.* H.R. 948, 116th Cong. (2019); S. 370, 116th Cong. (2019), S. 3214, 115th Cong. (2017); H.R. 5904, 115th Cong. (2017); S. 394, 112th Cong. (2011); H.R. 1899, 112th Cong. (2011).

Justice. The Federal Trade Commission's ability to bring action under the proposed legislation has now been removed.

E. The Problems Remedied by NOPEC

1. Comity

Comity concerns lie behind the issues that NOPEC addresses, even though NOPEC does not directly mention the term itself. Comity is a doctrine of international reciprocity. "Comity itself reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[47] The Department of Justice weighs several factors: "The existence of a purpose to affect or an actual effect on U.S. commerce; the significance and foreseeability of the effects of the anticompetitive conduct on the United States; the degree of conflict with a foreign jurisdiction's law or articulated policy; the extent to which the enforcement activities of another jurisdiction, including remedies resulting from those enforcement activities, may be affected; and the effectiveness of foreign enforcement as compared to U.S. enforcement."[48] The International Guidelines further caution that "the Agencies consider the extent to which a foreign sovereign encourages or discourages certain courses of conduct."[49]

A DOJ determination that the interests of comity are not impaired by bringing suit requires some deference if the issue is raised in court.[50] As Judge Wood wrote: "[T]he decision to prosecute a foreign corporation represents the assessment of the Executive Branch, through the Department of Justice, that the proceeding furthers U.S. interests. It is not up to the courts to monitor the extent of Justice's consultations with the Department

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[47] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, *Antitrust Guidelines for International Enforcement and Cooperation,* 27 (Jan. 13, 2017), https://www.justice.gov/atr/internationalguidelines [hereinafter *International Guidelines*] (internal quotations omitted).

[48] *Id.* at 28.

[49] *Id.* at 32.

[50] *See United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C.) ("The State Department has considered Finland's position, and the United States has decided to go ahead with the case. It is not the Court's role to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances."), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990).

of State, the Office of the U.S. Trade Representative, the Commerce Department, or any other interested entity, although we are aware that such consultations often take place."[51] Private litigants cannot give the courts assurance that the interests of foreign governments have been given adequate attention. Government litigants can. By giving the power to enforce NOPEC exclusively to the DOJ, the bill goes far to remove any concern a court might have as to whether the interests of foreign sovereigns have been accorded proper weight.

2. Act of State Doctrine

The Act of State doctrine "prevents courts from declaring invalid the official act of a foreign sovereign performed within its own territory."[52] According to the International Guidelines, "the Agencies may exercise enforcement discretion and decline to challenge foreign acts of state if the facts and circumstances indicate that: (1) the specific conduct complained of is a public act of the sovereign, (2) the act was taken within the territorial jurisdiction of the sovereign, and (3) the conduct relates to a matter that is governmental, rather than commercial."[53]

In the Supreme Court's most recent pronouncement on the subject,[54] the Court addressed a private civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO). Plaintiffs alleged that a company won a defense contract from the Nigerian government through bribery, in violation of the Foreign Corrupt Practices Act. The district court, seeking guidance from the Department of State, held that the Act of State doctrine applied. The Third Circuit reversed, and the Supreme Court agreed with the reversal.

The Supreme Court addressed the jurisdictional foundations of the Act of State doctrine: "We have more recently described [the Act of State doctrine]. . .as a consequence of domestic separation of powers, reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign

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[51] *United States v. Sinovel Wind Grp Co.*, 794 F.3d 787, 792 (7th Cir. 2015) (need a "compelling reason . . . to override the government's assessment. . .").

[52] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, *supra* note 47, at 35.

[53] *Id.*

[54] *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400 (1990).

affairs.[55]

The Court also indicated the doctrine is not one of abstention: "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."[56]

It is unclear whether the doctrine would shield state owned oil companies when they act in concert. It is questionable whether one could assert that the act of agreeing to restrict output is an act exclusively undertaken within the territory of the sovereign in which the state oil company exists, as the Supreme Court requires. Also, consistent with the exceptions of the FSIA, the DOJ would likely view the acts of state oil companies as being commercial activities. Such acts would not be the public act of the sovereign. NOPEC avoids all these problems, of course, because NOPEC would forbid courts from raising the doctrine to bar suit by the DOJ.

3. Foreign Sovereign Compulsion[57]

When a foreign sovereign compels the very conduct that the U.S. antitrust laws forbid, private parties may use the Foreign Sovereign Compulsion defense. To raise the defense, "the foreign government must have compelled the anticompetitive conduct under circumstances in which a refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions."[58] The conduct must be of the type that can only accomplished entirely within the foreign sovereign's own territory. Finally, the compulsion must arise from a foreign government acting in its official capacity; "The defense does not arise from conduct that would fall within the FSIA commercial activity exception."[59]

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55 *Id.* at 404.

56 *Id.* at 409.

57 We express no opinion here as to whether any OPEC member state's law compels any state-owned oil company to act in violation of U.S. antitrust laws.

58 U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMMISSION, supra note 47, at 33.

59 *Id.*

Even without NOPEC's prohibition against use of the doctrine to bar a DOJ suit, it is difficult to see a circumstance where the doctrine would apply.[60] To date, the only known case where the defense has been accepted is Interamerican *Refining Corp. v. Texaco Maracaibo, Inc.*[61] More recent cases, in seeming agreement with the International Guidelines, tend to require greater levels of proof of actual compulsion, rather than a mere suggestion.[62]

4. Foreign Sovereign Immunities Act

The sole basis for determining jurisdiction in a civil case in a U.S. court over a defendant that is a foreign state or instrumentality is the Foreign Sovereign Immunities Act (FSIA).[63] Apart from enumerated exceptions and treaties, the FSIA shields foreign states from civil jurisdiction in U.S. courts.[64]

As the International Guidelines point out, the most

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[60] Spencer Weber Waller, *Suing OPEC,* 64 U. PITT. L. REV. 105, 134 (2002) (noting doctrine successful only once "and has been otherwise rejected in each case because the court determined that the defendants acted pursuant to the advice, encouragement, or prodding of a foreign government but had not been subject to outright compulsion.").

[61] 307 F. Supp. 1291 (D. Del. 1970).

[62] *See* JEFFREY L. KESSLER & SPENCER WEBER WALLER, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW §11.10 (2d ed. 2018) ("[S]ome courts have been reluctant to apply the foreign compulsion defense in seemingly similar situations. The frequent failure of the defense has resulted from a judicial insistence on the presence of actual compulsion as a requirement for immunity. Knowledge, acquiescence, approval, participation, or even encouragement of the unlawful restraint by a foreign government is insufficient to provide immunity for a private firm violating the antitrust laws."). *See also Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018)(foreign country's interpretation of its domestic law not binding); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 801 (1993)(requiring actual compulsion for foreign sovereign compulsion defense).

[63] *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330 et. seq. (2019).

[64] The exceptions include: waived immunity explicitly or by implication; engaged in commercial activity; expropriated property in violation of international law; acquired rights to property in the United States; committed certain torts within the United States; or agreed to arbitration of the dispute. *See* Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016, 28 U.S.C. § 1605 (2019).

relevant exception is for "commercial activity."[65] Under the FSIA, "commercial activity" is defined to include "either a regular course of commercial conduct or a particular commercial transaction or act."[66] The International Guidelines indicate that with respect to state actors, the principal question is whether the government is acting "not as a regulator of a market, but in the manner of a private player within it."[67]

The International Guidelines firmly lead to the conclusion that state oil companies fall within the commercial exception: "As a practical matter, most activities of foreign state-owned enterprises operating in the commercial marketplace are 'commercial' and, therefore, such enterprises are not immune from the jurisdiction of the U.S. courts in actions to enforce the antitrust laws by virtue of the FSIA. The commercial activities of these enterprises are subject to the U.S. antitrust laws to the same extent as the activities of privately owned foreign firms."[68]

NOPEC makes it unnecessary to resolve the question whether the commercial exception applies to the conduct of state oil companies involved in a combination to restrain trade in oil and oil products. Under Section 3 of NOPEC, civil suits brought under NOPEC are expressly made a separate exception to the FSIA, thereby allowing such suits to proceed in federal court.[69]

NOPEC IS CONSISTENT WITH U.S. ANTITRUST POLICY

A. U.S. Justice Department Enforcement Policy

Price fixing cartels have been condemned as violating the Sherman Act virtually since the passage of the statute in 1890.[70]

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[65] A foreign state is not immune from an action brought in any court in the United States in any case ". . .in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, *supra* note 47, at 30-31.

[66] 28 U.S.C. § 1603(d) (2019).

[67] *Id.*

[68] *Id.*

[69] No Oil Producing and Exporting Cartels Act of 2019, *supra* note 16, at Sec. 3.

[70] See *United States v. Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898) (cartel of cast iron soil pipe manufacturers) (Taft, J.), *aff'd,* 175 U.S.

The prohibition was crystalized in a 1940 Supreme Court decision involving the criminal prosecution of the major oil companies for agreements restricting the output of gasoline: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[71]

The condemnation of cartels has applied to international cartels as well as domestic cartels. The DOJ's enforcement of the Sherman Act against international cartels began at the turn of the twentieth century when it brought criminal and civil cases against the American Tobacco Co. and two English companies for dividing world cigarette markets.[72] In the period leading up to World War II, the DOJ further intensified its enforcement efforts against international cartels. Between 1939 and 1943 it brought approximately thirty cases against U.S. and non-U.S. companies involved in international trade, in industries from synthetic rubber to potash to pharmaceuticals to titanium, including a criminal case against Standard Oil for conspiring with I.G. Farben to restrain trade in petroleum products and chemicals.[73]

The strongest and most consistent effort to stop international cartels, however, began in the 1990s and continues today.[74] Recent criminal prosecutions of international cartels have ranged from automobile parts, to financial services, to dynamic random access memory chips to liquid crystal displays (LCDs). In the auto parts prosecutions alone, more than thirty non-U.S. corporations have been convicted for fixing the prices of more than twenty different auto parts, ranging from brake hoses to spark plugs to seatbelts.[75]

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211 (1899).

[71] United States v. Socony –Vacuum Oil Co., 310 U.S. 150 (1940).

[72] See *United States v. American Tob. Co.*, 221 U.S. 106 (1911).

[73] *See* Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 728-30 (2001).

[74] In 1993 the Justice Department reported 25 grand juries investigating international cartels; in 2018 there were 91 open grand jury investigations. *See* U.S. DEP'T OF JUSTICE, *Division Update Spring 2019* (2019), https:// www.justice.gov/atr/division-operations/division-update-spring-2019/cartels-beware (numbers do not indicate how many of these investigations involve domestic cartels).

[75] *See* U.S. DEP'T OF JUSTICE, Division Update Spring 2015 (2015), https://www.justice.gov/atr/division-update/2015/criminal-program-update.

B. Territorial Reach of U.S. Antitrust Law

Although early cases cast doubt on the extent to which the U.S. antitrust laws extended to conduct that took place outside the territorial borders of the United States, the *Alcoa* decision in 1945 made clear that conduct that occurred abroad but was intended to affect, and did affect, U.S. commerce came within the prohibitions of the Sherman Act.[76] Most countries have subsequently adopted some version of this "effects" doctrine to reach cartel activity that occurs abroad but affects their markets. The result has been an increasing international effort to stop cartel activity wherever it occurs.

Despite this general agreement over cartel policy and the territorial reach of competition law, conflicts have arisen with countries that might prefer to shield their domestic companies from U.S. antitrust liability. As discussed above, this has led to the development of various U.S. doctrines designed to mediate these conflicts under an overall concept of "comity," as well as to some early attempts by foreign countries to block private lawsuits under U.S. antitrust law (discussed below). Congress also passed the Foreign Trade Antitrust Improvements Act (FTAIA) in 1984. This statute amended the antitrust laws to limit their coverage for conduct that occurs abroad unless that conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic commerce,[77] language that NOPEC replicates.

The FTAIA has reduced the ability of private parties to recover damages for conduct that occurs abroad,[78] but it has not affected the ability of the DOJ to prosecute international cartels that affect U.S. markets. For example, in the litigation over the price fixing of LCDs for consumer electronics, one court interpreted the FTAIA to restrict the private litigants but not the DOJ[79] and another found there was sufficient effect on direct imports of consumer electronics with price fixed LCDs to satisfy Section 1 for a criminal prosecution without regard to whether

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[76] United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

[77] *See* Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C.A. § 6a (West 2019).

[78] See F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (foreign purchasers of vitamins).

[79] See Motorola Mobility LLC v. AU Optronics Corp., 775 F. 3d 816, 825-26 (7th Cir. 2014) (distinguishing between private litigation and government enforcement under the FTAIA) (Posner, J.).

the effects on domestic U.S. commerce met the "direct, substantial, and reasonably foreseeable" test of the FTAIA.[80]

The willingness of the courts to reach conduct that a foreign sovereign might prefer to shield from liability was recently shown in the litigation involving the Chinese Vitamin C cartel.[81] There, the Supreme Court unanimously held that the views of a foreign government on whether its domestic producers were legally required to engage in a price fixing cartel were not entitled to absolute deference. The court of appeals previously held the Chinese Ministry's views on Chinese law were binding on it, but the Supreme Court disagreed: "[T]he appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials."[82] U.S. policy to deter international cartels will not be so easily evaded.

C. Conclusion

The U.S. government's unwillingness to prosecute the members of the OPEC cartel has been inconsistent with the general policy that the U.S. government has vigorously followed since the mid-1990s with regard to international cartels that harm U.S. consumers and markets. NOPEC now provides the DOJ with the opportunity to make its enforcement policies consistent with regard to all industries and all defendants.

THE DOJ RETAINS DISCRETION IN ENFORCING NOPEC

A. The DOJ's Enforcement Choices

1. General Choices

NOPEC creates a new substantive antitrust prohibition in addition to Section 1 of the Sherman Act. As a normal matter, Section 1's prohibition on "contracts, combinations, or

[80] See United States v. Hui Hsiung, 758 F.3d 1074, 1094 (9th Cir. 2014).

[81] See Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018).

[82] Id. at 1873.

conspiracies in restraint of trade"[83] can be enforced by multiple parties — the DOJ, the Federal Trade Commission (through Section 5 of the Federal Trade Commission Act), private parties (suing for monetary and injunctive relief), and State Attorneys General suing on behalf of their citizens. By contrast, NOPEC's Section 7A(a)'s prohibition on acting "collectively or in combination" to limit production of petroleum products, or to set their price, can be enforced only by the DOJ.[84]

Like any other antitrust law, the DOJ could enforce NOPEC in three different ways— criminal prosecution, civil proceeding for injunctive relief, and a civil suit for treble the damages the United States has suffered as a result of the violation of NOPEC.[85] These are not mutually exclusive, although the Department might choose not to pursue all of them.

2. Criminal Enforcement

As indicated above, the DOJ has been following a vigorous program of criminal enforcement against international cartels, involving prosecutions of corporate entities and their employees. Should the DOJ pursue criminal prosecution, it could choose to indict any of the parties enumerated in Section 7A(a), that is, foreign states or instrumentalities or "any other person" involved in the joint action. Under the Sherman Act and general federal law, "person" includes individuals and associations (e.g., corporations and partnerships).[86] Thus, a prosecution could include individuals who work for any of the entities being prosecuted, as well as non-sovereign entities, whether formed in the United States or elsewhere, that participate in the combination. Individuals can be prosecuted and punished even if they are citizens of countries other than the United States.[87]

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[83] Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

[84] No Oil Producing and Exporting Cartels Act of 2019, *supra* note 16, at Sec. 7(A).

[85] We confine our analysis to suits under NOPEC. There is nothing in NOPEC, however, that makes it the exclusive remedy for antitrust violations involving petroleum products. Thus, the DOJ could still choose to proceed under Section 1 of the Sherman Act if it thought that would be preferable.

[86] See 15 U.S.C. § 7. The Supreme Court has held that a foreign state can be a "person" for purposes of the Sherman Act, see Pfizer, Inc. v. Gov't of India, 434 U.S. 308 (1978) (suit for damages).

[87] *See* Scott D. Hammond, Dep'ty Ass't Attny Gen'l for Criminal Enforcement, Antitrust Div. U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades* 7-10 (Feb. 25, 2010),

The penalties for a criminal violation of the antitrust laws are fines and imprisonment.[88] The maximum fine for a corporation is the alternative of $100 million or twice the gain or loss from the violation.[89] The maximum penalties for individuals are a $1 million fine (or twice the gain or loss) and ten years in jail.

Within these maxima, actual penalties for specific antitrust violations are determined through application of the United States Sentencing Guidelines. Fines depend on a number of factors, including various indicia of culpability, but have generally focused on the amount of overcharge for the price fixed product.[90] These fines can be substantial.[91] Jail sentences are based primarily on the volume of commerce for the affected goods done by an individual's employer.[92] The average annual sentence of imprisonment in the five-year period from 2014 to 2019 has ranged from a high of 26 months to a low of 9 months.[93]

3. Civil Enforcement

The DOJ has chosen to bring criminal prosecutions only for those antitrust conspiracies that involve "hard core" price fixing and bid rigging. Other violations of Section 1, such as tying or exclusive dealing contracts, are pursued as civil matters, although, on occasion, the DOJ will prosecute price fixing agreements civilly rather than criminally.[94] If a case is brought

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https://www.justice.gov/atr/file/518241/download (discussing prosecution of individuals, including foreign nationals).

[88] Restitution is also possible as part of a plea agreement or condition of probation. The DOJ has obtained orders of restitution in some criminal cases, although it does not frequently seek them. We note that the bill does not specify the penalties for violating Section 7A. We are assuming that the drafters expect the penalty provisions for a Section 1 violation to apply to a Section 7A violation. It would be helpful if the bill clarified this point.

[89] See 15 U.S.C. § 1; 18 U.S.C. § 3571 (d) (alternative fine).

[90] *See Hui Hsiung*, 758 F. 3d at 1095 (gross gains is the "additional revenue to the conspirators from the conspiracy") (affirming $500 million corporate fine).

[91] *See* U.S. Dep't of Justice, Antitrust Div., Sherman Act Violations Yielding A Corporate Fine of $10 (144 fines in excess of $10 million).

[92] *See* U.S. Sentencing Guidelines Manual § 2R1.1 (U.S. Sentencing Comm'n 2004).

[93] *See* U.S. DEP'T OF JUSTICE, *Antitrust Div. Workload Statistics FY 2008-2017*, 13 (2018), https://www.justice.gov/atr/file/788426/download.

[94] See *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015)

civilly, the remedy is an injunction against engaging in the behavior in the future. Failure to comply with the injunction may result in either civil or criminal contempt proceedings, which can raise enforcement issues of their own. There are no fines for a civil violation of the antitrust laws.

The DOJ has unreviewable discretion with regard to proceeding civilly. It might choose to do so in a NOPEC case, for example, if it felt that it could more easily meet the lower burden of proof for civil cases (proof by a preponderance of the evidence rather than beyond a reasonable doubt) or if it felt that the defendants had some foreign policy argument against imposing criminal liability or if it believed that it could only sue state owned companies civilly (discussed below[95]). If the DOJ did proceed with a civil suit, however, it might lose the incentives that its criminal amnesty program provides to cartel participants who seek amnesty from criminal prosecution in exchange for cooperating with the DOJ in the investigation. It would also have a weaker remedy to apply.

4. Suits for Damages to the United States

Section 4A of the Clayton Act gives the DOJ the right to sue for three times the damages to its "business or property" caused by a violation of the antitrust laws.[96] No doubt the United States government purchases large amounts of gasoline and petroleum products; at least in theory, this provision could provide U.S. taxpayers with substantial relief from any overcharges that the government has incurred within the statute of limitations period.

There are at least two important obstacles to bringing a successful Section 4A suit. For one, only those who have purchased directly from price fixers can bring antitrust damages suits. To the extent that any agreements on price or output were effected at the production level, the U.S. government would be able to sue only for sales made directly to it at that level, not to purchases made from refiners or downstream distributors. For another, proving the "but for" price in this market might be difficult. The government does not have to make this proof in a criminal prosecution or in a civil case seeking an injunction, but

(ebooks price fixing conspiracy).

[95] *See infra* text accompanying notes 105-111.

[96] 15 U.S.C. § 15a.

it would if it were asking for damages.

Although as a historical matter Section 4A has rarely been enforced, in 2018 the DOJ announced a settlement of a Section 4A case in connection with bid rigging of fuel contracts to the U.S. military in Korea.[97] Despite this recent case, we believe that the legal issues in suing oil producers for damages makes a Section 4A suit for damages unlikely.

B. Special Enforcement Problems in Suing Oil Producers Under NOPEC

1. Enforcement of Judgments

Some critics of the NOPEC legislation suggest it would be difficult to enforce a judgment under Section 7A(a), raising the possibility that the U.S. would need to seize foreign investments in the United States, "particularly in the refining sector."[98] It is difficult to see why the DOJ would need to resort to such extreme measures or why the "refining sector" would have particular problems. True, potential criminal fines might be substantial, but these are not levied until the conclusion of a criminal proceeding at which the defendant has appeared and defended itself. The DOJ does not appear to have problems obtaining payment of criminal fines in other antitrust cases involving foreign and domestic companies without resorting to seizure of assets. We do not see why this sector should be any different. Civil litigation would only be for injunctive relief, not damages; enforcement of the injunction through a seizure of property seems quite unlikely.

2. Retaliation

a. Legislative Retaliation

Prior to the 1980s, in some instances in which the U.S. has enforced its antitrust laws against foreign cartels, U.S. trading

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[97] *See* Makan Delrahim, Ass't Attny Gen'l, Antitrust Div. U.S. Dep't of Justice, *November Rain: Antitrust Enforcement on Behalf of American Consumers and Taxpayers* 6-7 (Nov. 15, 2018), https://www.justice.gov/opa/speech/file/1111651/download.

[98] *See* Lucian Pugliaresi, *NOPEC Oil Nonsense*, REAL CLEAR ENERGY (March 20 2019), https://realclearenergy.org/articles/2019/03/20/nopec_oil_nonsense.html.

partners enacted legislation blocking discovery and permitting defendants to "claw back" the treble-damages portion of any private recovery that might be awarded by a U.S. court.[99] The effect of the statutes was limited, in part due to lax antitrust enforcement in the 1980s and increased harmonization of antitrust efforts in recent decades as many foreign countries (particularly in Europe) came to appreciate the value of antitrust law and enforcement.

b. Financial Retaliation

Antitrust enforcement against state oil companies might also become part of a larger set of trade disputes and tariff retaliations. As the George W. Bush administration stated in its opposition to the bill in 2007, "[t]his would result in a targeting of foreign direct investment in the United States as a source of damage awards and would likely spur retaliatory action against American interests in those countries and lead to a reduction in oil available to U.S. refiners."[100] However, this type of retaliation seems unlikely. As noted above, the DOJ likely will not be seeking any damages, so there would be no "damages awards" to enforce. Regardless, even in the most drastic and overstated of scenarios, the U.S. of course could respond in kind to actions seeking to circumvent the functioning of markets and antitrust enforcement.

The U.S. ability to counter output limits from OPEC countries stands in some contrast to the situation in earlier times. Of course, the most prominent example of OPEC restricting oil to the U.S. is the oil embargo in the 1970s. As described on the U.S. Government's Office of the Historian site, "[t]he price of oil per barrel first doubled, then quadrupled, imposing skyrocketing costs on consumers and structural challenges to the stability of

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[99] Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001). See also Donald J. Curotto, *Comment, Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11 GOLDEN GATE U. L. REV. 577(1981).

[100] OFFICE OF MGMT. & AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, Statement of Administration Policy H.R.. 2264 – no oil producing and exporting cartels act of 2007 (NOPEC) (2007), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/legislative/sap/110-1/hr2264sap-h.pdf.

whole national economies."[101] Lack of a supply response allowed for oil prices to escalate unchecked and shortages to commence. Today, the U.S. is the largest producer of oil in the world.[102] Thus, a price increase or output restriction would precipitate substantial supply responses from U.S. producers.

As for some form of asymmetric retaliation against U.S. assets in OPEC countries, it is worth noting that even when private parties were trying to sue OPEC, with the potential for large damages awards, the OPEC countries did not engage in retaliation. Instead, they hired lawyers to fight the litigation (successfully) in federal court.[103]

3. Procedural Problems

As noted above, the *Prewitt* and *Freedom Watch* cases foundered on the plaintiffs' inability to serve OPEC. The NOPEC legislation does not address the procedural problem involved in those cases. It may very well be, however, that the DOJ will be able to avoid the litigation problems that the private civil plaintiffs encountered, for example, by proceeding criminally where different service rules apply, or by not charging OPEC at all.[104] Accordingly, the NOPEC bill need not address these procedural issues.

4. Jurisdictional Problems

A more serious concern is whether foreign sovereigns or their instrumentalities (SOEs) can be criminally prosecuted for

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[101] U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, Oil Embargo Milestones 1969-1976, Oil Embargo 1973-1974 (2016), https://history.state.gov/milestones/1969-1976/oil-embargo.

[102] *See* U.S. ENERGY INFORMATION ADMINISTRATION, *March 2019 Monthly Energy Review*, Figure 11.1A: World Crude Oil Production Overview https://www.eia.gov/totalenergy/data/monthly/pdf/merg.pdf.

[103] We note that in the International Association of Machinists litigation, discussed above, OPEC and its member states were represented on appeal by Antonin Scalia, then a professor at the University of Chicago Law School. *See Int'l Ass'n of Machinists and Aerospace Workers v. The Org. of the Petroleum Exporting Companies (OPEC)*, 649 F.2d 1354 (9th Cir. 1981).

[104] See *In re Pangang Grp. Co.*, 901 F.3d 1046 (9th Cir. 2018) (indictment of Chinese government SOE for violating Economic Espionage Act; service on counsel upheld under FR Crim P Rule 4) (denying mandamus petition).

violating Section 7A(a). The NOPEC bill would remove immunity under the Foreign Sovereign Immunities Act (FSIA) for Section 7A(a) violations, but the FSIA covers civil suits.[105] Does the FSIA's failure to cover criminal suits against foreign sovereigns or their instrumentalities mean that such entities are immune from criminal prosecution or are they simply outside the scope of the FSIA?

There are few lower court decisions on this issue and no Supreme Court decision directly on point.[106] The D.C. Circuit, however, recently held that a grand jury subpoena is enforceable against an SOE.[107] The Court of Appeals first compared the broad statutory language conferring district court jurisdiction in criminal cases to the FSIA's provision conferring limited jurisdiction over certain civil claims.[108] Deciding that the FSIA left intact the district court's broad criminal jurisdiction, the Court of Appeals simply applied the FSIA's substantive exemption from immunity for commercial activity. The court pointed out that the FSIA sought to ensure that foreign sovereigns would not be immune from liability for their commercial activities. To read the FSIA as immunizing criminal activity would mean that "a foreign-sovereign-owned, purely commercial enterprise operating within the United States could flagrantly violate criminal laws and the U.S. government would be powerless to respond save through diplomatic pressure. . . . We doubt very much that Congress so dramatically gutted the government's crime-fighting toolkit."[109]

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[105] See 28 U.S.C. § 1330 (a) ("The district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state."). See also International Guidelines § 4.2.1 (FSIA shields foreign states "from the civil jurisdiction" of U.S. courts).

[106] For lower court decisions, compare Keller v. Central Bank of Nigeria, 277 F. 3d 811, 820 (6th Cir. 2002) (foreign sovereign cannot be indicted for criminal predicate offense under RICO) (civil case) with In re Grand Jury Proceeding Related to M/V Deltuva, 752 F. Supp. 2d 173, 179-80 (D. P.R. 2010) (FSIA does not apply to criminal cases) (denying motion to quash grand jury subpoena directed at Lithuanian SOE). See also Samantar v. Yousuf, 560 U.S. 305, 323 (2010) (FSIA does not apply to immunity claims of foreign government officials; this was "not the particular problem to which Congress was responding when it enacted the FSIA").

[107] *In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir. 2019), *cert. denied*, 139 S.Ct. 1378 (March 25, 2019).

[108] See 18 U.S.C. § 3231 (district courts have original jurisdiction "of all offenses against the laws of the United States").

[109] In re Grand Jury Subpoena, 912 F.3d at 630.

The D.C. Circuit's position is consistent with government practice outside the antitrust area.[110] As the Solicitor General told the Supreme Court in that case, "the United States has not understood government-owned businesses to be immune from criminal prosecution."[111] The position of the D.C. Circuit and the Solicitor General produces a sensible result in a NOPEC prosecution against an SOE. In passing this statute, Congress should not be seen as leaving the DOJ to the weak civil law remedies the antitrust laws provide. Criminal enforcement of the antitrust laws should be in the DOJ's "toolkit," subject to the exercise of its discretion.

C. Conclusion

NOPEC is a relatively moderate measure by virtue of its not exposing participants in the oil cartel to the full panoply of enforcement that the antitrust laws ordinarily provide. Private litigation opens up the possibility of large damages judgments, or even default judgments. When it comes to government litigation by the DOJ, however, different remedy choices and different interests come into play. Governments around the world have reached an accommodation with the DOJ's criminal enforcement, even as they may still be concerned about private plaintiffs. We do not foresee retaliation for the DOJ's international cartel enforcement and we would not expect to see it if the DOJ determines, after internal consultation, that litigation is appropriate.

Moderation, of course, is not weakness. Should the DOJ choose to pursue criminal remedies, significant penalties will be possible. Past experience with international cartels where participants face significant liability shows a race to the DOJ to offer substantial assistance in return for leniency. We would

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[110] See, e.g., United States v. United Microelectronics Corp., No. 18-cr-465 (N.D. Cal. 2018) (charging theft of trade secrets by Chinese government SOE). See also In Re Grand Jury Subpoena, Brief for the United States in Opposition, No. 18-948, at 18 (Feb. 2019) (asserting "decades of practice under which the United States has prosecuted and served criminal process on commercial enterprises that are majority-owned by foreign governments") (citing cases including United States v. Statoil, ASA, No. 06-cr-960, S.D.N.Y. Oct. 13, 2006, a criminal information and deferred prosecution agreement against Norwegian state-owned oil company).

[111] In Re Grand Jury Subpoena, Brief for the United States in Opposition, *supra* note 107, at 23.

expect similar actions should NOPEC be enacted into law and the DOJ begins its consideration of bringing a prosecution under it.

CONCLUSION

NOPEC is an important part of a worldwide effort to stop international cartels that harm consumers and reduce economic welfare. The United States has been in the forefront of this effort, but it is no longer the only country involved in this type of enforcement. Passage of NOPEC reinforces the U.S. commitment to apply competition law carefully but fully, a commitment that we want other countries to follow as well.

Makan Delrahim, the current head of the DOJ's Antitrust Division, wrote the following nearly fifteen years ago:[112]

> The task for antitrust practitioners, including those of us in the government, and for the courts, is to manage the application of U.S. antitrust law to the shrinking economic world. On the one hand, we need to maintain vigorous enforcement when anticompetitive conduct, whether domestic or foreign, harms U.S. commerce and U.S. consumers. That enforcement should not be frustrated by statutory misinterpretations that create loopholes for cartels and other antitrust violators to exploit. On the other hand, the U.S. should not be the world's antitrust police, nor our courts the world's courts. When antitrust claims do not arise from effects on U.S. commerce, or when the effects on U.S. commerce are de minimis or remote, we must respect the antitrust regimes of other countries and the policy choices that these (typically democratic) countries have made.

NOPEC closes "loopholes" that the oil cartelists exploit. By removing the roadblocks created by past judicial decisions, the bill provides Congressional permission to the DOJ to act against the oil cartel, a cartel that has had substantial effects on U.S. commerce for many decades. If NOPEC were enacted, it would still be up to the DOJ to decide how to proceed.

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[112] Makan Delrahim, *Drawing The Boundaries Of The Sherman Act: Recent Developments In The Application Of The Antitrust Laws To Foreign Conduct*, 61 ANN. SURVEY AM. L. 415, 430-31 (2005).

APPENDIX A

116th CONGRESS, 1st Session

United States Library of Congress

S.370*

Introduced in Senate

February 7, 2019

S.370

To amend the Sherman Act to make oil-producing and exporting cartels illegal.

IN THE SENATE OF THE UNITED STATES

February 7, 2019

Mr. Grassley (for himself, Ms. Klobuchar, Mr. Lee, and Mr. Leahy) introduced the following bill; which was read twice and referred to the Committee on the Judiciary:

A BILL

To amend the Sherman Act to make oil-producing and exporting cartels illegal.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the 'No Oil Producing and Exporting Cartels Act of 2019' or 'NOPEC'.

SEC. 2. SHERMAN ACT.

The Sherman Act (15 U.S.C. 1 et seq.) is amended by adding after section 7 the following:

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* The House bill, H.R. 948, is virtually identical except for some differences in punctuation.

'SEC. 7A. OIL PRODUCING CARTELS.

'(a) In General. It shall be illegal and a violation of this Act for any foreign state, or any instrumentality or agent of any foreign state, to act collectively or in combination with any other foreign state, any instrumentality or agent of any other foreign state, or any other person, whether by cartel or any other association or form of cooperation or joint action-

'(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, when such action, combination, or collective action 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.

'(b) Inapplicability of Defenses. No court of the United States shall decline, based on the act of state, foreign sovereign compulsion, or political question doctrine to make a determination on the merits in an action brought under this section.

'(c) Enforcement. The Attorney General of the United States shall have the sole authority to bring an action to enforce this section. Any such action shall be brought in any district court of the United States as provided under the antitrust laws.'.

SEC. 3. NO SOVEREIGN IMMUNITY IN OIL CARTEL CASES.

Title 28, United States Code, is amended-

(1) in section 1605(a)-

(A) in paragraph (5), by striking 'or' after the semicolon;

(B) in paragraph (6), by striking the period and inserting '; or'; and

(C) by adding at the end the following: '(7) in which the action is brought under section 7A of the Sherman Act.'; and

(2) in section 1610(a)-

(A) in paragraph (7) by striking the period at the end and inserting ', or'; and

(B) by adding at the end the following: '(8) the judgment relates to a claim that is brought under section 7A of the Sherman Act.'.

SEC. 4. SEVERABILITY.

If any provision of this Act (or of an amendment made by this Act) is held invalid the remainder of this Act (or of the amendment) shall not be affected thereby.

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