

SLAYING GOLIATH: THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST LAW TO OPEC

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INTRODUCTION

The oil crisis of the 1970s left an indelible mark on United States history and American culture.¹ Beginning in October of 1973, retail gasoline prices climbed by more than forty percent in a matter of months, resulting in daily price increases.² “Gas lines”³ wound into the streets, allowing motorists to fuel their tanks, and often only for a limited purchase.⁴ In some parts of the country, gas stations ran out of fuel.⁵ Prices made gas unaffordable, forcing millions of Americans

1. See generally Energy Information Administration, *World Oil Market and Oil Price Chronologies: 1970–2000* (Jan. 2001), available at <http://www.eia.doe.gov/emeu/cabs/chron.html> (providing pertinent information regarding the status of the world's oil market and prices during the years 1970-2000); Barbara Rudolph, *Enjoy Now, Pay Later; As Oil Imports Rise and Output Falls, the U.S. May Face a Future Shock*, 129 TIME MAG., Mar. 16, 1987, at 54, available at 1987 WL 2364550 (pointing out the oil price-shocks of the early 1970s and Americans' reliance on gas for their cars and home heating).

2. See generally STEPHEN G. RABE, *THE ROAD TO OPEC: UNITED STATES RELATIONS WITH VENEZUELA, 1919-1976* 180-82 (1982) (discussing the effect of the 1970s oil embargo on gasoline prices); see also DANIEL YERGIN, *THE PRIZE* 616 (1991) (“American motorists saw retail gasoline prices climb by more than 40 percent . . . [and n]o other price change had such visible, immediate, and visceral effects as that of gasoline.”).

3. See YERGIN, *supra* note 2, at 616-17 (detailing the desperation of Americans to keep their automobiles supplied with gasoline, even if it was with the most minimal amount); see also 146 CONG. REC. S1942 (daily ed. Mar. 30, 2000) (statement of Sen. Specter) (“[In 1974 p]eople lined up for three blocks waiting in a gas line to get some fuel. By the time you got there, the pumps sometimes were out or sometimes it was limited.”).

4. See YERGIN, *supra* note 2, at 617.

5. See *id.* (noting that many gas stations throughout the United States were supplied with enough gasoline to service only a limited number of motorists, and many “sprouted ‘Sorry, No Gas Today’ signs”).

to limit usage of their automobiles.⁶ Similarly, many were unable to afford their severe home heating bills.⁷ While a crisis as grim as the one felt in the early- to mid-1970s is unlikely to occur in the near future,⁸ America has recently witnessed dramatic oil price inflation.⁹

The member countries of the Organization of Petroleum Exporting Countries (“OPEC”)¹⁰ took collaborative actions beginning in March 1999, to reduce oil production thereby depriving the market of four million barrels a day amounting to approximately six percent of the global oil supply.¹¹ Historically, OPEC, in its capacity as an international conglomerate,¹² used its power to substantially inflate the price of oil.¹³ More recently, the world has seen prices escalate from nearly eleven dollars per barrel in December 1998, to over thirty-seven dollars per barrel by October 2000.¹⁴

6. See *id.* at 617 (depicting the strife with which Americans dealt on a daily basis regarding the inflated gasoline prices of the early 1970s).

7. See Mark T.L. Sargent, Comment, *Economics Upside-Down: Low-Price Guarantees As Mechanisms For Facilitating Tacit Collusion*, 141 U. PA. L. REV. 2055, 2063 (1993) (describing how American consumers adapted to the increased oil prices during the 1970s by driving smaller cars, improving insulation in homes, and turning to alternative energy sources).

8. See Reuters, *40 Years Later, OPEC has World Running on Empty* (Sept. 6, 2000), available at <http://www.cnn.com/2000/WORLD/meast/09/06/energy.opec.anniv.reut> (asserting that while the United States is fearful that another “1970’s-style” recession might occur, not only is this type of recession unlikely, but “the world is far better prepared to manage another OPEC crisis than in the ‘70s”).

9. See *id.* (discussing the oil production reductions and price increases that OPEC has made beginning in 1998); see also *infra* text accompanying notes 10-14 (providing an overview of OPEC’s recent efforts at unilaterally effecting the price of oil on a global scale).

10. See *infra* Part I (discussing the formation, history, and objectives of OPEC).

11. See also Oil Price Reduction Act of 2000, H.R. 3822, 106th Cong. § 2(4) (2000) (“[A]rtificial supply constraints placed on the market are ultimately self-defeating in so far as they increase volatility in the market, lead to boom and bust cycles, and promote global instability, particularly in developing countries . . .”); see *infra* Part I.B (asserting that OPEC cut back oil production and increased oil prices again beginning in 1999).

12. See JOHN EVANS, OPEC, ITS MEMBER STATES AND THE WORLD ENERGY MARKET 129 (1986) (stating that a 1960 treaty established OPEC as a permanent inter-governmental organization and the United Nations Economic and Social Council subsequently recognized OPEC as such).

13. See LORING ALLEN, OPEC OIL xi-xiv (1979) (explaining that OPEC always has used its power to control substantially the prices of oil in the world market).

14. Practically speaking, \$37.00 per barrel translates to just under \$1.60 per gallon. See *Motor Gasoline Price Survey*, available at <http://www.eia.doe.gov/rtlgas.txt> (last visited Oct. 31, 2000) (providing current U.S. retail gasoline price statistics); see, e.g., Liz Cho, *Woes at the Pump: Gas Prices Hurting Midwest Business* (June 18, 2000), available at <http://go3.163.com/~cifco/news/news062002.htm> (last visited Apr. 9, 2001) (explaining that the Midwest is feeling the effects of OPEC more than anywhere else in the United States). In June 2000, gas prices were well over \$2.00 per gallon in Chicago, reaching an all-time high. See *id.* These price hikes hurt businesses, especially those that require long-distance transportation. See *id.* See also H.R. 3822 § 2(5) (stating that gas prices in the year 2000 are the highest they have been since the Persian Gulf War); Jodie T. Allen, et al., *No, It’s Not the 70’s Relax. Rising Oil Prices Aren’t Likely to Derail the Economy*, U.S. NEWS & WORLD REP., Sept. 25,

OPEC's past and current control of a significant portion of the world's oil, is nothing less than "reprehensible."¹⁵ OPEC's operations, if conducted within the United States, would constitute a criminal conspiracy in restraint of trade under the Sherman Antitrust Act ("Sherman Act").¹⁶ U.S. antitrust laws, most notably the Sherman Act, prohibit anti-competitive restraints of trade, monopolies, and price discrimination, all of which result in either driving competitors out of business or raising "prices to a level that will enable the predator to recover its losses and, in the long run, earn additional profits."¹⁷ Accordingly, OPEC's policies essentially force American motorists to incur substantially higher gasoline prices, while OPEC's revenue continues to soar.¹⁸ To date, U.S. courts are reluctant to alter or restructure current laws that would facilitate a suit against OPEC in a U.S. court.

This Comment argues that OPEC's actions, with respect to its members' collusive oil-production level-setting and price-fixing activities, are in violation of U.S. antitrust laws, and that in order to issue an injunction to halt the increase in gas prices, outdated notions of OPEC's sovereign immunity must be abandoned. OPEC's activities directly effect the United States. While previously unsuccessful, the United States should consider legal action against OPEC with a new approach and new analysis of the underlying legal doctrines. The United States has historically evaded assertions of extraterritorial antitrust jurisdiction over foreign sovereigns.¹⁹ This Comment will demonstrate that the blanket of sovereign immunity does not shield OPEC's actions, and that the United States should address the matter judicially, by bringing an antitrust suit against

2000, at 1-2, *available at* 2000 WL 7718795 (providing a commentary on the recent increase in oil prices as well as where the blame lies for such an increase).

15. See 146 CONG. REC. S1942 (characterizing OPEC's behavior as effectuating a restraint of trade thereby justifying filing an antitrust suit against OPEC).

16. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994 & Supp. IV 1998). See *infra* note 70 (providing an in-depth analysis of the Sherman Act).

17. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993) (Stevens, J., dissenting) (explaining that the purpose of all three antitrust statutes is to prohibit the practice of selling below cost to adversely affect competitors).

18. See Press Release, House International Relations Committee, "Oil Producers in Clover While Our Consumers are in Hock," Gilman Tells Richardson, *available at* www.house.gov/international_relations/press/106sec/62prjun27.html (June 27, 2000) (discussing oil producers' multi-billion dollar profits following OPEC's price increases, as well as the effect of such an increase on Americans).

19. See *infra* notes 60-165 and accompanying text (providing a historical analysis of the extraterritorial application of U.S. antitrust law).

OPEC.²⁰ In support of this conclusion, this Comment will show that OPEC's actions are patently commercial in nature, thereby undermining the classic defense of sovereign immunity.²¹

Part I of this Comment provides an overview of OPEC's role as a cartel in world oil production, focusing on its price-fixing tendencies in both the past and present.²² Part II explores current U.S. antitrust laws and their extraterritorial application, while considering the issues of foreign response and international comity.²³ Part III discusses the doctrine of sovereign immunity and its codification under The Foreign Sovereign Immunities Act,²⁴ highlighting the exceptions that strip sovereigns of their immunity.²⁵ Part IV identifies prior rulings of litigation brought against OPEC, the defects inherent in those decisions, and how, with a proper reading of the applicable doctrines, coupled with recent legislation, the United States can and should assert jurisdiction over OPEC and its member nations.²⁶ This Comment concludes that, in conjunction with overcoming the various jurisprudential obstacles preventing antitrust jurisdiction over OPEC, U.S. courts will be able to issue an injunction thereby precluding OPEC's continued oil price-fixing and reversing the gas price increase.

20. See *infra* Part IV.B (discussing why OPEC should not retain its sovereign immunity status).

21. See *infra* notes 245-55 (explaining why OPEC's activities and practices should be categorized as commercial in nature).

22. See *infra* Part I (evaluating OPEC's role as an international cartel in the global oil market).

23. See *infra* Part II (explaining existing antitrust statutes in the United States); *infra* Part IV.D (recounting past and present readings of the extraterritorial application of U.S. antitrust law and the consequences that ensued therefrom).

24. See *infra* Part III.A (discussing the Foreign Sovereign Immunities Act, its use as a defense to antitrust allegations, and the relevant exceptions).

25. See *infra* Part III (outlining the limitations on extraterritorial antitrust jurisdiction based on sovereign interests and exceptions attached thereto).

26. See *infra* Part IV (explaining why the United States should file an antitrust suit against OPEC).

I. OPEC AND ITS HISTORY

OPEC is an intergovernmental organization dedicated to maintaining the stability and prosperity of the petroleum market.²⁷ Formed in September 1960,²⁸ eleven member countries²⁹ currently comprise OPEC and represent the world's major producers and exporters of crude petroleum.³⁰ OPEC's objective is to coordinate and unify the petroleum policies of its member countries.³¹ It purports to secure fair and stable prices for petroleum producers, produce an efficient, economic, and regular supply of petroleum to consuming nations, and provide a fair return on capital to those investing in the industry.³²

OPEC is not, however, a commercial entity as it does not itself conduct business transactions.³³ "OPEC aims to coordinate the [output and] production policies of its Member Countries through consensus decision making."³⁴ Accordingly, OPEC's member

27. See *OPEC Online: About OPEC*, available at http://www.opec.org/About_OPEC/About_OPEC.htm (last visited May 26, 2001) (providing an overview of the functions OPEC serves).

28. See HORST MENDERSHAUSEN, *COPING WITH THE OIL CRISIS: FRENCH AND GERMAN EXPERIENCES 12-13 (1976)* (offering a history leading up to the formation of OPEC). Five founding members including Iran, Iraq, Kuwait, Saudi Arabia and Venezuela, formed OPEC at the Baghdad Conference on September 10-14, 1960. See *id.* at 13. The five oil-exporting countries created OPEC "as a direct response to the challenge posed by the multinational oil companies in arbitrarily and unilaterally reducing the posted prices of crude oil in February 1959 and again in August 1960." See *id.* at 12.

29. See *OPEC Online: Member Countries*, available at http://www.opec.org/Member_Countries/Member_Countries.htm (last visited May 20, 2001) (stating that OPEC's eleven member countries currently include: Algeria, Libya, Nigeria, Indonesia, Iran, Iraq, Kuwait, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela).

30. See ALLEN, *supra* note 13, at xi (discussing how OPEC's dominance over the world oil market has "worsened inflation and recession and forced oil-consuming countries to make unwanted changes, while greatly enhancing its members' welfare and prospects of development").

31. See *OPEC Online: Answers to Frequently Asked Questions About OPEC*, available at <http://www.opec.org/FAQs/AnswersAboutOPEC.htm> (last visited May 26, 2001) (elucidating the goal and purpose for which OPEC was formed).

32. See *OPEC Online: About OPEC—OPEC History*, available at http://www.opec.org/About_OPEC/History.htm (last visited May 26, 2001) (recounting OPEC's objectives as set out in the OPEC statute).

33. See MANA SAEED AL-OTAIBA, *OPEC AND THE PETROLEUM INDUSTRY 65 (1975)* (explaining OPEC's status as a permanent organization with international status and noting that OPEC is not a commercial establishment); see also *International Uranium Cartel, 1977: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 226 (1977)* (statement of Jerry McAfee, Chairman and Chief Executive Officer of Gulf Oil Corp.) (noting that OPEC's member countries' governments assist OPEC in enforcing compliance with price and output guidelines).

34. *OPEC Online: Answers to Frequently Asked Questions About OPEC*, available at

countries maintain absolute sovereignty over their respective oil production.³⁵ Each member country undertakes the production of oil through its national oil company (“NOC”).³⁶ Correspondingly, each member country’s government completely owns its NOC and considers its NOC as an “agent or instrumentality”³⁷ of that member country.³⁸

A. OPEC: *The Most Powerful Cartel in the World*

A “cartel” is an association of producers and/or consumers of a certain product, formed for the purpose of manipulating the product’s price in a given market.³⁹ Cartels use a variety of means to affect prices; the most effective is to coordinate limits on production by each member so as to lower the supply, relative to the demand of the good.⁴⁰ OPEC is widely known as the most prominent cartel in

<http://www.opec.org/FAQs/AnswersAboutOPEC.htm> (last visited May 26, 2001). See generally AL-OTAIBA, *supra* note 33, at 107 (discussing OPEC’s objectives upon formation to stabilize prices and prevent harmful fluctuations).

35. See *OPEC Online: Answers to Frequently Asked Questions About OPEC*, available at <http://www.opec.org/FAQs/AnswersAboutOPEC.htm> (last visited May 26, 2001) (providing information with respect to the control that each OPEC member-nation has over its respective rates of oil production).

36. See COBY VAN DER LINDE, *THE STATE AND THE INTERNATIONAL OIL MARKET* 12-16 (2000) (explaining that each member country determines whether it maintains exclusive state ownership of its NOCs). The government-owned oil companies that exist under the OPEC umbrella include Saudi Aramco (Saudi Arabia), Pertamina (Indonesia), Sonatrach (Algeria), Kuwait Petroleum Corporation (Kuwait), Qatar General Petroleum Corporation (Qatar), Petroleos de Venezuela, S.A. (Venezuela), Nigerian National Petroleum Corporation (Nigeria), Iraq National Oil Company (Iraq), Abu Dahbi National Oil Company (United Arab Emirates), National Iranian Oil Company (Iran), and Libyan National Oil Company (the Socialist People’s Libyan Arab Jamahiriya). See *OPEC Online: Member Countries*, available at http://www.opec.org/Member_Countries/Member_Countries.htm (last visited May 27, 2001).

37. 28 U.S.C. § 1603(b) (1994 & Supp. IV 1998) (“An ‘agency or instrumentality of a foreign state’ means any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a state of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.”).

38. See generally VAN DER LINDE, *supra* note 36, at 97-126 (providing an overview of the ways by which oil producing countries’ NOC function).

39. See HEINRICH KRONSTEIN, *THE LAW OF INTERNATIONAL CARTELS* 41 (1973) (defining a cartel “as a coordination of the economic behavior of independent partners, based on their consent, which results in regulation of [a particular market]”); see also Sidney Weintraub, *The Example of OPEC and the Possibility of Other Producer Cartels*, 24 AM. U. L. REV. 1097, 1103 (1975) (asserting that a cartel requires certain conditions to manipulate effectively the market, including low price elasticity of demand and supply limits from non-cartel producers); JACK HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 251 (4th ed. 1988) (defining a cartel as an agreement among producers to raise their prices above the competitive level by lowering production).

40. See JAMIE R. MARQUEZ, *OIL PRICE EFFECTS AND OPEC’S PRICING POLICY: AN*

the international economy;⁴¹ it is a multi-national alliance, whose members act collusively with the objectives of creating productive ineffectiveness and augmenting prices, thereby harming the countries it serves by siphoning those countries' wealth.⁴²

OPEC is essentially "[a] cooperation among governments to control the operations of an industry they own or control through dominance of price and supply."⁴³ In the mid-1970s OPEC supplied 84% of the world's total oil exports and owned nearly 70% of the world's oil reserves.⁴⁴ This number continued to grow well into the 1980s.⁴⁵ The high oil prices led to the expansion of supplies from non-OPEC producers.⁴⁶ Nevertheless, the Energy Information Administration ("EIA")⁴⁷ estimates that OPEC's eleven members account for approximately "40% of world oil production and about 77% of the world's proven oil reserves."⁴⁸ Although to a lesser extent than a quarter-century ago, OPEC remains the dominant force in the

OPTIMAL CONTROL APPROACH 1 (1984) (asserting that the effects of oil price augmentation by the economies of oil importing countries stem from both the demand and supply side). "Taking into account both demand and supply responses, an increase in the price of oil results . . . in a decrease in real income and an increase in inflation of oil importers." *Id.*

41. *See id.* at 2 (assessing the power and influence OPEC can exert on the oil industry).

42. *See* FREDERIC SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 23-27 (3d ed. 1990) (finding that the inefficiency of allocation is attributable to the diversion of resources from the cartel market as well as quotas on production levels).

43. ALLEN, *supra* note 13, at 126.

44. *Id.* at xi.

45. *See* Carol A. Dahl, *U.S. and World Oil Production and Production Costs in the 1980s*, in *AFTER THE OIL PRICE COLLAPSE: OPEC, THE UNITED STATES, AND THE WORLD OIL MARKET* 109-10 (Wilfred L. Kohl ed., 1991) (discussing OPEC's dominance of the world oil market extending from the early to mid-1970s well into the 1980s).

46. *See* Energy Information Administration, *Non-OPEC Fact Sheet*, at <http://www.eia.doe.gov/emeu/cabs/nonopec.html> (last modified June 19, 2000) (providing a comparison of the oil industries in non-OPEC countries to those in OPEC countries). Though they help only one-fourth of the proven oil reserves globally, non-OPEC countries supply approximately 58% of the world's crude oil. *Id.* Seven countries, which are Canada, the United Kingdom, Mexico, Norway, China, the United States, and Russia, dominate non-OPEC production. *Id.* They hold 67% of non-OPEC proven oil reserves and generate approximately 68% of non-OPEC oil. *Id.*

47. *See* Energy Information Administration, *About Us*, at <http://www.eia.doe.gov/neic/aboutEIA/aboutus.htm> (last modified Oct. 8, 2000) (explaining that Congress established the EIA in 1977, to serve as a statistical agency of the U.S. Department of Energy, and to "provide policy-independent data, forecasts, and analyses to promote sound policy making, efficient markets, and public understanding regarding energy and its interaction with the economy and the environment").

48. Energy Information Administration, *OPEC Fact Sheet: Background*, at <http://eia.doe.gov/emeu/cabs/opec.htm> (last modified May 7, 2001) (providing OPEC's oil pricing trends and production and reserve levels). Total world oil supply includes crude oil, natural gas liquids, and refinery gain. *Id.*

oil market.⁴⁹

B. OPEC's Impact on the Oil Industry

OPEC is not a monopoly, as it does not seek to drive other competitors out of the market.⁵⁰ Yet, OPEC does produce approximately 40% of the world's oil supply and exports about 55% of internationally traded oil.⁵¹ The OPEC statute, written at OPEC's inception, declares OPEC's dedication to subsidizing the petroleum market, providing steady supplies to consumers and fair returns to investors in the oil industry.⁵² Despite this proclamation, the world has seen its share of "energy crises," with OPEC at the helm.⁵³

Throughout the last three decades, the world has witnessed several periods of unrest in the Middle East in part resulting in nightmarishly high oil prices.⁵⁴ In each occasion, OPEC proved to be a fundamental

49. Compare text accompanying notes 44 and 45, with text accompanying note 47 (providing the difference in OPEC's control of the world oil market in the 1970s and today).

50. See GEORGE HORWICH & DAVID LEO WEIMER, *RESPONDING TO INTERNATIONAL OIL CRISES* 276 (1988) (stating that despite OPEC's global power, "it lacks the cohesion to act as a monopolist"). A monopoly is defined as an entity possessing the power or ability to control or fix prices in or exclude competition from a given market. See EARL W. KINTNER, *AN ANTITRUST PRIMER: A GUIDE TO ANTITRUST AND TRADE REGULATION LAWS FOR BUSINESSMEN* 99-100 (1964) (providing an overview of the concept of monopolization). While OPEC does control a significant portion of the world oil market, it does not have monopoly power as it does not seek to exclude other oil producers and exporters from the oil market.

51. See *OPEC Online: How does OPEC oil production affect oil prices?*, available at <http://www.opec.org/FAQs/AnswersAboutOPEC.htm> (last visited Apr. 2, 2001) (describing the extent of OPEC's control over the global oil market).

52. See OPEC Statute, approved Jan. 1961, art. 2(b) & (c), available at <http://www.opec.org/Publications/OS/OS.pdf>.

53. See WILLIAM R. FREUDENBERG & ROBERT GRAMLING, *OIL IN TROUBLED WATERS: PERCEPTIONS, POLITICS, AND THE BATTLE OVER OFFSHORE DRILLING* 22-23 (1994) (describing the circumstances surrounding OPEC's cut in oil production and consequent oil price escalation).

54. In an era beginning in the early 1970s, OPEC showed the world how it could unilaterally affect the world's oil market. On October 5, 1973, Egypt and Syria invaded Israel, initiating the Arab-Israeli War, also known as the "Yom Kippur War." See *West Texas Research Group, History and Analysis*, available at <http://www.wtrg.com/prices.htm> (last visited Apr. 3, 2001) (offering a history and analysis of crude oil). The United States and many countries in the western world showed strong support for Israel. *Id.* In retaliation for the support extended to Israel, the Arab exporting nations belonging to OPEC imposed an embargo on the nations extending such support. See *id.* Consequently, OPEC, during a three-month period lasting between October, 1973 and January, 1974, increased the price of oil from \$3.00 to \$11.65 per barrel. See FREUDENBERG & GRAMLING, *supra* note 53, at 23 (discussing the oil embargo of the early 1970s and its effect on world oil prices); see also JOHN M. BLAIR, *THE CONTROL OF OIL* 264 (1976) (explaining that in order to maintain the higher prices, OPEC's Arab members declared on October 17, 1973, that they would reduce production by 5% in October and by an additional 5% in each subsequent month unless all Israeli forces were withdrawn from occupied Arab territories and the Palestinians' rights were restored). The United States, who outrightly imported the majority of its petroleum from OPEC, subsequently, suffers

player.⁵⁵ Recently, OPEC captured the headlines again setting oil prices at a ten-year high.⁵⁶ OPEC, in its capacity as the world's superpower in the oil industry, withheld production from the market and drove up prices nearly 300% from early 1999 to October 2000.⁵⁷

The actions attributable to this current "crisis" are clear-cut

years of recession, inflation, and unemployment. See Richard Mably, *The Arab embargo—from oil crisis to OPEC crisis*, MIDDLE EAST TIMES, EGYPT ED., Oct. 18, 1998 (comparing the oil crisis of the 1970s to the "oil shock" of today), available at <http://metimes.com/issue98-42/methaus.htm> (opinion section) (last visited Mar. 3, 2001).

Between 1974 and 1978, crude oil prices steadily escalated from \$12 to \$14 dollars per barrel. See West Texas Research Group, *Oil Price History and Analysis*, available at <http://www.wtrg.com/prices.htm> (last visited Apr. 3, 2001) (discussing the state of world oil prices after the end of the oil embargo of the early 1970s). However, crude oil prices increase again between 1978 and 1980 following tumultuous events in Iran and Iraq. See *id.* (providing an overview of crude oil prices, the relationship between prices and world events, and the outlook for the future of the petroleum industry). During the six months beginning November of 1978, the Iranian Revolution causes the loss of nearly 2.5 million barrels of oil per day. See *id.* "In 1980, Iraq's crude oil production fell 2.7 million barrels per day, and Iran's production by 600,000 barrels per day during the Iran/Iraq war. The combination of these two events results in crude oil prices more than doubling from \$14 in 1978 to \$35 per barrel in 1981." *Id.*

In 1989-90, Kuwait, instead of cutting production to let Iraq recoup more profits, pumped more oil than its agreed OPEC quota, driving world prices down. See Youssef M. Ibrahim, *Iraq Seeks Bigger Role in OPEC*, N.Y. TIMES, June 27, 1990, at D1 (noting that Kuwait exceeded its quota by 400,000 barrels of oil per day). See also Jean Manas, *Beyond Right and Wrong? Thoughts Induced By A Post-Modernist Critique Of The Gulf War*, 36 HARV. INT'L L.J. 245, 250 (1995) (estimating that Kuwait's increases in oil production cost Iraq seven billion dollars annually in lost revenues). On August 2, 1990, Iraqi military forces invaded the neighboring nation of Kuwait. See Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1 (describing the Iraqi invasion of Kuwait). Iraq's President, Saddam Hussein, apparently wanted to seize control over Kuwait due to its oil pricing, production, and sales. See *id.* Kuwait's unwillingness to raise its oil prices in the world market may have triggered Iraq to attack. See Rex J. Zedalis, *Burning of the Kuwaiti Oilfields and the Laws of War*, 24 VAND. J. TRANSNAT'L L. 711, 712 (1991) (noting that Kuwait's oil revenues would help Iraq alleviate its war debt). President Hussein believed that because Kuwait had been situated historically within Iraq's borders, Iraq was entitled to Kuwait's oil resources and revenues. See Gerald F. Seib, *The Mideast Conflict: Iraq Can Make Claim to Kuwait, But It's a Shaky One*, WALL ST. J., Aug. 13, 1990, at A5 (articulating Iraq's historical claim to portions of Kuwait considered to be its own). Consequently, in an effort to drive the price of oil back up, and combat the low prices set by Kuwait, OPEC significantly cut production, thereby increasing the demand and the price of oil. See Manas, *supra* note 54, at 250; see also Energy Information Administration, *Iraq*, available at <http://www.eia.doe.gov/cabs/iraq.html> (Sept. 2000) (indicating that Iraqi oil production dropped from 3.5 million barrels per day in July of 1990 to 300,000 barrels per day following the invasion of Kuwait).

55. See generally *supra* note 54 (describing the world's oil crisis dating back to the early 1970s and OPEC's role in each).

56. See *Revenge of the Old Economy*, BUS. WK., Sept. 25, 2000, at 38 (discussing the increase in gasoline prices since late 1998), available at WL 24485423.

57. See International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. § (2)(1) (2000) (explaining OPEC's cutbacks in oil production and its augmentation in oil prices). See generally *supra* note 14 and accompanying text (providing information on OPEC's recent increase of oil prices).

violations of U.S. antitrust laws, as discussed in the following section.⁵⁸ OPEC “has upset the world power balance, worsened inflation . . . and forced [the United States] to make unwanted changes, while greatly enhancing its members’ welfare and prospects of development.”⁵⁹ The approach to reconciling this problem, however, must be multifaceted.

II. U.S. ANTITRUST LAW

A. Overview of Existing Law

The term “antitrust” encompasses a set of national policies originally designed with four general goals:⁶⁰ (1) to govern big business;⁶¹ (2) to provide efficient performance;⁶² (3) to ensure fair business conduct;⁶³ and (4) to protect competitive processes by restricting market power.⁶⁴ Antitrust violations⁶⁵ typically stem from price discrimination,⁶⁶ price-fixing,⁶⁷ unlawful restraints of trade,⁶⁸ and

58. See *infra* Parts II.A-D (discussing the history and current application of U.S. antitrust laws).

59. ALLEN, *supra* note 13, at xi.

60. See CARL KAYSER & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 44 (1965) (articulating four goals).

61. See *id.* at 17-18 (discussing this goal); *id.* at 49 (reflecting that because big business power and market power are co-dependent, restraining market control limits business power); see also ELEANOR M. FOX & LAWRENCE A. SULLIVAN, CASES AND MATERIALS ON ANTITRUST 1 (1989) (explaining that antitrust law increased in response to big business).

62. See KAYSER & TURNER, *supra* note 60, at 11-14 (discussing this goal); *id.* at 52-53 (enunciating that “progress and efficiency are the two great historical achievements of American industry; the simple and obvious aim of public policy in matters of industrial organization should be to promote more progress and efficiency”).

63. See *id.* at 16-17 (discussing this goal); *id.* at 56 (finding that increasing market competition yields transactions that are more fair).

64. See *id.* at 14-16 (discussing this goal); *id.* at 58-59 (stating the primary policy goal of antitrust law is to limit undue market power to achieve desirable economic performance).

65. See BLACK’S LAW DICTIONARY 92 (7th ed. 1999) (noting that antitrust legislation protects trade and commerce against four types of attack).

66. Price discrimination is “[t]he selling of a good or service of given quality and average cost at different prices to different buyers.” DAVID N. HYMAN, MODERN MICROECONOMICS: ANALYSIS AND APPLICATIONS G-3 (3d ed. 1993). Price discrimination can be seen in two forms: direct and indirect price discrimination. See KINTNER, *supra* note 50, at 64. “A direct price discrimination is obvious on its face: a seller charges different prices to different buyers. A indirect price discrimination, on the other hand, occurs when differing terms or conditions of sale result in a lower [or higher] price to certain buyers.” *Id.*

67. See *infra* Part II.B (providing a synopsis of the doctrine of price fixing).

68. Restraints of trade are “agreement[s] between or combination[s] of businesses intended to eliminate competition, create a monopoly, artificially raise prices, or otherwise adversely affect the free market.” BLACK’S LAW DICTIONARY 1316 (7th ed. 1999). There are two types of unlawful restraints of trade: vertical and horizontal. See *id.* Vertical restraints refer to restraints “imposed by agreement

monopolies.⁶⁹

Federal anti-competitive and antitrust legislation begins with the legislative trio of the Sherman Act,⁷⁰ the Clayton Act,⁷¹ and the Robinson-Patman Act.⁷² These statutes proscribe, in part, that “the predatory practice of deliberately selling below cost to undermine a competitor, either to drive the competitor out of business or to raise

between firms at different levels of distribution” *Id.* Horizontal restraints refer to restraints “imposed by agreement between competitors at the same level of distribution.” *Id.*

69. A monopoly, in its simplest form, refers to the restriction of competition. *See, e.g.,* A CENTURY OF THE SHERMAN ACT 33 (Jack C. High & Wayne E. Gable eds., 1992). More specifically, “‘monopoly,’ or ‘monopoly power,’ has been defined as the power or ability to fix or control prices in or exclude competition from a relevant market.” KINTNER, *supra* note 50, at 99-100.

70. 15 U.S.C. §§ 1-7 (1994 & Supp. IV 1998). John Sherman drafted the Sherman bill, as it was labeled originally, in 1890 in response to the excesses of the railroad and oil monopolies of the 19th century. *See generally* ALBERT WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA 2-5 (1910) (providing a prelude to the enactment of the Sherman Antitrust Act). The Sherman bill was intended to prohibit restraints to free competition among commercial enterprises by outlawing attempts at monopolization. *See id.* at 4-5. This Comment will focus primarily on sections 1, 6a, and 7 of the Sherman Antitrust Act. Section 1 declares: “[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 declared to be illegal.” 15 U.S.C. § 1 (1994 & Supp. IV 1998). Section 6a provides in pertinent part: “[s]ections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect [on trade or commerce].” 15 U.S.C. § 6a (1994 & Supp. IV 1998) (alteration added). Section 7 defines “person” or “persons”: “[t]he word ‘person’, or ‘persons’, wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.” 15 U.S.C. § 7 (1994 & Supp. IV 1998). Notably, for Sherman Act analysis, this definition would include OPEC and its member-nations as each of the oil companies producing OPEC’s oil is under the direct control of their respective member-nation.

71. 15 U.S.C. §§ 12-27 (1994 & Supp. IV 1998); 29 U.S.C. §§ 52-53 (1994 & Supp. IV 1998). Congress passed the Clayton Act to repair certain flaws and omissions of the Sherman Act. *See* KINTNER, *supra* note 50, at 22-23 (finding that while a Sherman Act violation requires actual and substantive anti-competitive effects, the Clayton Act needs only a probability of substantially lessening competition, regardless of actual results). The Clayton Act was essentially a patchwork repair to the deficiencies of the Sherman Act. *See id.* at 23 (comparing the Clayton and Sherman Acts). Practically speaking, both the Clayton and the Sherman Acts, however, seek to prevent price discrimination, anti-competitive conduct, and monopolization. *Id.* Aside from filling gaps and omissions in the Sherman Act, Congress enacted the Clayton Act to deal with, among other things, mergers, acquisitions, and exclusive dealings. Thus, for purposes of this Comment, any reference to the Clayton Act beyond this cursory comparison to the Sherman Act would be irrelevant and is therefore omitted.

72. 15 U.S.C. §§ 13, 13a, 13b, 21a (1994 & Supp. IV 1998). *See generally* RICHARD A. POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES I (1976) (“The Robinson-Patman Act is a ‘complex’ statute regulating pricing and other practices in the distribution of goods.”). Congress passed it in an effort to remove price discrimination and promote fair competition. *Id.* For purposes of this Comment, discussion of the Robinson-Patman Act is irrelevant and will therefore be omitted.

prices to a level that will enable the predator to recover its losses and 'in the long run' earn additional profits."⁷³

Although the Clayton and Robinson-Patman Acts serve specific purposes, the Sherman Antitrust Act undeniably remains the centerpiece of U.S. antitrust law.

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.⁷⁴

In order to effectuate its purposes and goals, the Sherman Act affords causes of action to the government and to private persons injured by unlawful restraints of trade and unfair business conduct.⁷⁵ Moreover, the Act aims to eliminate anti-competitive conduct occurring in interstate as well as international commerce.⁷⁶ In theory, when foreign corporations⁷⁷ or U.S. subsidiaries located abroad violate U.S. antitrust law, they should be treated no differently than domestic corporations, who arguably are engaging in the same activities.⁷⁸

B. *The Meaning and Background of Price-Fixing*

"Perhaps the best-known antitrust violation is price-fixing, usually attacked under section 1 of the [Sherman Act]. Courts broadly define price-fixing [as] business or market combinations 'formed for the

73. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993) (Stevens, J., dissenting).

74. *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

75. See 15 U.S.C. § 6a (1994 & Supp. IV. 1998) (speaking to the reach of the Sherman Act's applicability); see also *In re Ins. Antitrust Litig.*, 938 F.2d 919, 932-34 (9th Cir. 1991) (noting that the Sherman Antitrust Act grants standing to all antitrust violations that injure directly and indirectly), *rev'g* 723 F. Supp. 434 (N.D. Cal. 1989), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

76. See 15 U.S.C. § 6a (1994 & Supp. IV 1998) (referring to the applicability of the Sherman Act to conduct involving commerce with foreign nations); see also Jeffrey L. Cotter, Comment, *Extraterritorial Jurisdiction: The Application of U.S. Antitrust Laws to Acts Outside the United States—Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993), 20 WM. MITCHELL L. REV. 1109, 1115-16 (1994) (explaining that the Sherman Act can be applied to business transactions conducted domestically and those conducted abroad).

77. See Walker, *supra* note 70 (providing that for Sherman Act analysis, a corporation is considered a "person").

78. See also Renee Hardt, *Kodak v. Fuji: A Test Case for the Extraterritorial Application Sherman Act*, 15 B.U. INT'L L.J. 309, 314 (1997) (indicating that the Sherman Act is applied abroad).

purpose and with the effect of raising, depressing, fixing, . . . or stabilizing the price of a commodity in . . . commerce’.⁷⁹ Historically, courts have considered price-fixing activities under either the *per se* illegal or the rule of reason approaches.⁸⁰ The *per se* rule is used when a court characterizes an activity as one “that would always or almost always tend to restrict competition. . . .”⁸¹ The courts adopted a *per se* rule for price-fixing because the Supreme Court expressed in *Northern Pacific Railway*, that the effects of price-fixing are so invariably injurious that no inquiry into them is required.⁸² Merely engaging in the proscribed conduct by agreeing to fix prices is a sufficient basis for liability.⁸³

The rule of reason approach, on the other hand, involves an extensive analysis of the restraint of trade in place, which includes balancing the anti-competitive effects of the restraint against any pro-competitive effect of the restraint.⁸⁴ If a court applies the rule of reason, a great deal of judicial scrutiny is applied to the alleged price-fixing practices.⁸⁵ The two rules are mutually exclusive, yet once the *per se* rule is invoked, the activity in question is “conclusively

79. Douglas R. Richmond, *Private Colleges And Tuition Price-Fixing: An Antitrust Primer*, 17 J.C. & U.L. 271, 275 (1991) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)).

80. *See id.* at 281 (discussing the *per se* illegal and rule of reason doctrines and their use in determining “whether challenged activities unreasonably restrain trade in violation of the Sherman Act”).

81. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979). *See Socony-Vacuum Oil Co.*, 310 U.S. at 223 (finding that under the Sherman Act a combination formed for the purpose of and with the effect of fixing prices is illegal *per se*).

82. *See Socony-Vacuum Oil Co.*, 310 U.S. at 223 (asserting that when a court finds a practice to be *per se* illegal, it is conclusively presumed to be illegal without any analysis of the underlying motivation behind such activity); *see also* *Sitkin Smelting & Refining Co. v. FMC Corp.*, 575 F.2d 440, 446 (3d Cir. 1978) (holding that the *per se* category of antitrust violations is made up of agreements or practices which because of their pernicious effect on competition are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry into the precise harm they have caused or business excuse for their use).

83. *See N. Pac. Ry.*, 356 U.S. at 5 (holding that there are certain agreements or practices which because of their injurious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use); *see also* *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-51 (1977) (market restraints which affect price are illegal *per se*, and therefore no elaborate inquiry need be made into the rationale behind the challenged conduct).

84. *See* *Graphic Prod. Distributors v. Itek Corp.*, 717 F.2d 1560, 1567-68 (11th Cir. 1983) (distinguishing when to utilize either the *per se* rule or the rule of reason); *see also* LAWRENCE SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 187 (1977) (asserting that to apply the rule of reason “one must first identify specifically the practice involved”).

85. *See* SULLIVAN, *supra* note 84, at 187 (positing that when an antitrust violation is being handled judicially, analysis into the alleged misconduct is required to determine whether a certain practice has an effect on competition).

presumed illegal without further examination under the rule of reason.”⁸⁶

Price-fixing, such as the type OPEC engages in, is commonly referred to as horizontal price-fixing.⁸⁷ This practice refers to an agreement between competitors who play the same market role, such as manufacturers or wholesalers, to set, directly or indirectly, a price for a specific commodity.⁸⁸ A cartel⁸⁹ arrangement, as with OPEC, is a prime example of horizontal price-fixing.⁹⁰

Historically, the judicial system’s original approach to horizontal price-fixing was an attempt to completely eliminate cartels.⁹¹ A cartel agreement, which can be effective only if the cartel members possess market power, results in a transfer of wealth from consumers to producers, and a loss of allocative efficiency by reason of increased prices and consequently a lower volume of production.⁹² It is this latter result—a decrease in the overall resource and financial wealth of society vis-à-vis price fixing—that provides the primary rationale for banning cartels.⁹³

Arguably, the OPEC cartel, through its price-fixing activities, commits a *per se* violation of section one of the Sherman Act. However, given the jurisdictional impediments preventing a suit against OPEC in U.S. courts, such activities cannot be monitored or controlled by the United States. Without antitrust sanctions,

86. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (inferring when to advance the *per se* rule of price-fixing).

87. See generally MICHAEL J. COZZILLO & MARK S. LEVINSTEIN, *SPORTS LAW: CASES AND MATERIALS* 259 (1997) (describing the characteristics of a horizontal agreement).

88. See Joseph W. deFuria, Jr., *Reasoning Per Se and Horizontal Price-Fixing: An Emerging Trend in Antitrust Litigation?*, 14 PEPP. L. REV. 39, 39 n.2 (1986) (discussing the *per se* rule as applied to horizontal price-fixing).

89. A cartel is defined as “[a] combination of producers or sellers that join together to control a product’s production or price.” BLACK’S LAW DICTIONARY 206 (7th ed. 1999).

90. See *infra* Part IV.B (discussing why the collusive activities of OPEC and its member countries, all of whose national oil companies operate at the same level of the market, rise to the level of price-fixing).

91. See KRONSTEIN, *supra* note 39, at 357 (noting courts’ recognition of the dangers that are inherent in cartels and the approaches taken to remedy these dangers).

92. See *id.* at 340-41 (asserting that producers will possess market power if they collectively face a downward-sloping demand curve, so that their joint output decisions will determine what price they can charge).

93. See Thomas R. Webb, Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach*, 92 YALE L.J. 706, 710-11 (1983) (stating that cartels should be proscribed because they invariably lead to undesirable economic effects); see also *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323-24 (1897) (explaining that cartels whose purposes are to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold will have the effect of rendering the public subject to the decision of the cartel).

diplomacy cannot adequately deter cartel formation because it cannot impose penalties on governments and cooperative private companies that attempt to organize cartels, nor can they force existing cartels to disgorge the profits reaped from their collusive price-fixing activities.⁹⁴

*C. The Consistent Inconsistencies When Extraterritorially Applying
U.S. Antitrust Laws*

Few aspects of the Sherman Act generate as much controversy as its application to international trade or commerce.⁹⁵ Neither the Sherman Act itself nor its legislative history provides any clear indicia of the scope of the extraterritorial⁹⁶ jurisdiction conferred.⁹⁷ For nearly a century, courts attempted to define the metes and bounds of the extraterritorial application of U.S. antitrust laws yet were unsuccessful in its demarcation.⁹⁸ A string of landmark cases strove to define express limits, yet no bright line rule has emerged from these opinions.⁹⁹ However, in *Hartford Fire Ins. Co. v. California*,¹⁰⁰ the Supreme Court abandoned the approach used by most federal courts¹⁰¹ in determining how to apply the Sherman Act extraterritorially.¹⁰² Following the ruling in *Hartford Fire*, the United States need not defer to the trade laws and policies of foreign

94. See International Uranium Cartel, 1977: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 95th Cong. 2 (1977) (statement by Rep. Albert Gore, Jr.) (maintaining that the availability of antitrust sanctions would further the anti-cartel objective).

95. Earl W. Kintner & Joseph P. Griffin, Note, *Jurisdiction Over Foreign Commerce Under the Sherman Antitrust Act*, 18 B.C. INT'L & COMP. L. REV. 199, 199 (1977) (discussing the controversy surrounding the application of the Sherman Act to foreign commerce).

96. "Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders." *Env'tl. Def. Fund v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993).

97. See Kintner & Griffin, *supra* note 95, at 201-02 (providing commentary on the congressional intent behind the enactment of the Sherman Act); see also Jo Rachel Backer, Comment, *Sherman Act Jurisdiction and the Acts of Foreign Sovereigns*, 77 COLUM. L. REV. 1247, 1248-49 (1977) (noting the lack of clarity with respect to the extraterritorial application of the Sherman Act).

98. See Cotter, *supra* note 76, at 1117 (citing precedent delineating the uncertainty of the extraterritorial applicability of the Sherman Act).

99. See discussion *infra* Parts II.C.1, II.D (focusing on precedent dealing with the extraterritorial application of U.S. antitrust laws).

100. 509 U.S. 764 (1993).

101. See generally discussion *infra* Parts II.C.1-2 (discussing the varying approaches taken by federal courts in their application of the Sherman Act to acts abroad prior to the Supreme Court's decision in *Hartford Fire*).

102. See Varun Gupta, Note, *After Hartford Fire: Antitrust and Comity*, 84 GEO. L.J. 2287, 2287 (1996) (providing an overview of the history leading up to the Supreme Court's current approach to applying U.S. antitrust law extraterritorially).

nations.¹⁰³ The United States, in deciding whether or not to assert the Sherman Act to the acts of foreign nations, may now solely evaluate whether the foreign conduct intended substantial effect on the American marketplace.¹⁰⁴ The now defunct concept of heeding the trade interests of a foreign nation with the expectation that that foreign nation will reciprocate and likewise refrain from exercising jurisdiction, is commonly known as international comity.¹⁰⁵ Until the decision in *Hartford Fire*, U.S. courts adhered to this concept when deciding whether or not to subject foreign nations to antitrust enforcement.¹⁰⁶ Although comity may, and presumably would, still be raised as a defense in an antitrust debate, its analysis is now moot when determining whether to assert the Sherman Act abroad. Meeting the requirement of the intended and substantial effects, coupled with the minimum contact requirement of personal jurisdiction,¹⁰⁷ satisfies U.S. interests in international comity.¹⁰⁸ Since the United States is effectively willing to permit foreign nations to subject American entities to similar antitrust enforcement, it is not concerned with foreign nations' potential negative reactions.¹⁰⁹ Also, as a practical procedural matter, "the traditional U.S. interest in being fair to foreign [entities] is sufficiently protected by the requirement that foreign businesses have 'minimum contacts' with the United States to be brought into U.S. courts for violating U.S.

103. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993) (advancing the rule that a U.S. court has jurisdiction over foreign conduct that produces some substantial effect in the United States).

104. See *id.*

105. See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 n.1 (1982) (defining comity as the voluntary "forbearance in the exercise of legitimate jurisdiction when another sovereign also has legitimate jurisdiction under international law"). Maier notes that in the exercise of comity, one nation refrains from enforcement of its interests ideally, while the sovereign with the greatest interest will be permitted to pursue resolution. *Id.* at 281.

106. See *Hartford Fire*, 509 U.S. at 798 (noting that "Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity").

107. In order to subject a defendant to suit in a specific forum, the defendant is required to have certain minimum contacts with the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). When determining whether such minimum contacts exist, courts must address the core issue of whether a non-resident's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Due to the effects foreign entities can have in the United States, the requisite minimum contacts of personal jurisdiction will be assumed in all instances when discussing the extraterritorial application of U.S. antitrust laws for purposes of this Comment.

108. See Gupta, *supra* note 102, at 2317-18 (explaining the irrelevance of comity analysis).

109. See *id.* at 2318.

antitrust law.”¹¹⁰

1. *The basis for extending the reach of the Sherman Act to acts performed abroad: the “effects” test*

The legal significance of comity in antitrust cases diminished substantially as new concerns regarding international antitrust cases emerged.¹¹¹ “Neither the United States government nor courts in private antitrust litigation are required to engage in a comity interest balancing analysis before proceeding in a foreign commerce case.”¹¹² Accordingly, to explain why comity analysis is no longer necessary, the following outlines the cases preceding *Hartford Fire* and explains the abolition of the comity doctrine.¹¹³

The first Supreme Court foreign commerce case addressing the extraterritorial application of the Sherman Act was *American Banana Co. v. United Fruit Co.*,¹¹⁴ a private treble action case¹¹⁵ brought in 1909. In *American Banana*, the Supreme Court determined antitrust laws do not extend outside the borders of the United States because Congress failed to express a clear intent to apply the Act extraterritorially.¹¹⁶ The Court added that the lawfulness of an activity is usually based

110. *Id.*

111. *See supra* Part II.C and *infra* Part II.D (discussing why comity analysis essentially has been replaced by an inquiry into whether activities of foreign nations have a substantial and intended effect on the U.S. market).

112. Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 565 (2000).

113. *See infra* text accompanying notes 114-55 (discussing case law leading up to the Supreme Court's decision in *Hartford Fire* to abandon comity analysis).

114. 213 U.S. 347 (1909). In *American Banana*, the plaintiff alleged that the defendant monopolized the Central American banana trade by acquiring several Costa Rican and Panamanian fruit distributors in violation of the Sherman Act. *American Banana*, 213 U.S. at 355-57.

115. *See* 15 U.S.C. § 15 (1994 & Supp. IV 1998). The statutory language defining a treble damages action provides that any person “injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.” *Id.* Section 7 of the Sherman Act, which first created the treble damages action has since been replaced by § 4 of the Clayton Act. The Clayton Act, however, basically reenacted the damage provision of the Sherman Act and extended the remedy to the new substantive violations the Clayton Act established.

116. *See American Banana*, 213 U.S. at 359 (“A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.”); *see also* James S. McNeill, Comment, *Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction*, 28 CAL. W. INT'L L.J. 425, 431 (1998) (commenting that the Supreme Court dealt with the extraterritorial application of the Sherman Act for the first time in *American Banana*). McNeill points out that when the Court applied the view that the Sherman Act could not reach antitrust violations occurring outside the jurisdiction of the United States, the first signs of judicial confusion about how to analyze international antitrust disputes became apparent. *Id.* The Court determined that any action taken in the United States courts would interfere with the authority of another sovereign's freedom to regulate commerce as it saw fit. *Id.* at 431-32.

upon the laws of the country in which the activity took place.¹¹⁷ However, in 1945, the Second Circuit's decision in *United States v. Aluminum Co. of America*¹¹⁸ [hereinafter "*Alcoa*"]¹¹⁹ essentially overruled the precedent set by *American Banana*.¹²⁰ The Second Circuit was acting in lieu of the Supreme Court due to lack of quorum among the Justices.¹²¹ *Alcoa* became the first case to uphold the extraterritorial application of U.S. antitrust law.¹²²

In *Alcoa*, Aluminum Limited ("Limited"), a Canadian corporation, colluded with German, French, Swiss, and British corporations to form a foreign cartel under the guise of a Swiss corporation.¹²³ Through self-imposed production quotas, the cartel attempted to control aluminum production.¹²⁴ While all of the defendant cartel members were foreign, the quota severely restricted production of aluminum imported into the United States.¹²⁵ The central question in this case was whether the Sherman Act could be applied to

117. See *American Banana*, 213 U.S. at 356 (indicating that to subject an actor of another jurisdiction to the laws of the jurisdiction in which his acts effects were felt, would not only be unjust, but would interfere with the authority of another sovereign and would be contrary to international notions of comity); see *infra* notes 134-38 and accompanying text (defining the concept of comity and its international implications).

118. 148 F.2d 416 (2d Cir. 1945).

119. *Alcoa* was a Pennsylvania corporation organized in 1888 and it continued to monopolize the ingot aluminum industry, as it was the industry's sole manufacturer, for thirty years in the United States. *Aluminum Co. of Am.*, 148 F.2d at 422.

120. See *id.* at 443-44 (finding that, in certain circumstances, the Sherman Act may extend beyond the borders of the United States).

121. The appeal went to the Second Circuit because the Supreme Court was unable to achieve a quorum of six justices. See 15 U.S.C. § 29 (1994 & Supp. IV 1998) (stipulating that the Supreme Court has the discretion to "remand [a] case to the court of appeals which shall then have jurisdiction to hear and determine the same as if the appeal . . . had been docketed in the court of appeals in the first instance [given that the action is brought under the Sherman Act]").

122. See *Aluminum Co. of Am.*, 148 F.2d at 443-44 (holding that the Sherman Act is applicable to acts outside the United States having consequences inside the United States); see also Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: A Postscript on Hartford Fire Insurance Co. v. California*, 34 VA. J. INT'L L. 213, 214 (1993) (asserting that *Alcoa* began the trend of asserting "jurisdiction over foreign defendants whose anti-competitive activities have the *intended effect* of causing a substantially adverse impact in U.S. commerce") (emphasis added).

123. See *Aluminum Co. of Am.*, 148 F.2d at 442 (describing the character of the agreement, which triggered Sherman Act application).

124. See *id.* at 442 ("The . . . 'cartel[]' provided for the formation of a corporation . . . [which] was from time to time to fix a quota of production . . ."). See generally James M. Grippando, *Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstinence Doctrine*, 23 VA. J. INT'L L. 395, 403 (1983) (recounting the history leading up to the formulation of the "effects" test promulgated in *Alcoa*).

125. In *Alcoa*, the U.S. government sought to break up *Alcoa*'s domestic aluminum monopoly, and also challenged activities of *Alcoa*'s independent Canadian subsidiary, Aluminum Limited. See *Aluminum Co. of Am.*, 148 F.2d at 421-22; see also Grippando, *supra* note 124, at 403 (discussing the power possessed by the cartel members in *Alcoa* as well as the far-reaching effects of their concerted actions).

invalidate a foreign cartel when its only connection to the United States was the importation of aluminum ingot to the U.S. market.¹²⁶

The Second Circuit, acting in lieu of the Supreme Court,¹²⁷ articulated in *Alcoa* a two-pronged “effects” test for determining federal jurisdiction over foreign companies.¹²⁸ Under the “effects” test, the conduct first must have a substantial and intended negative effect on U.S. commerce.¹²⁹ Second, the conduct actually has to have such a negative effect.¹³⁰ Accordingly, the court in *Alcoa* found antitrust violations and applied the Sherman Act extraterritorially as the foreign conduct indeed manifested negative effects in the United States, and such effects were intended.¹³¹

Following *Alcoa*, the “effects” test gained wide acceptance in the United States,¹³² yet received criticism abroad.¹³³ Much of the

126. See *Aluminum Co. of Am.*, 148 F.2d at 443 (discussing application of the Sherman Act to foreign corporations for conduct outside the United States).

127. See *supra* note 121 (explaining why the Second Circuit in this instance heard the case).

128. See *Aluminum Co. of Am.*, 148 F.2d at 443 (asserting that where both conditions of “intent” and “effect” are satisfied, the exercise of jurisdiction is proper).

129. See *id.* (finding that the requisite intent of the international cartel members in their agreement was expressly made when they sought to achieve an effect upon imports into the United States).

130. See *id.* (ruling that the Sherman Act applies extraterritorially only if both intent and effect are present); cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 415 reporters note 3 (1987) [hereinafter RESTATEMENT (THIRD)] (maintaining that *Alcoa* established a two-part test requiring intent and effect).

131. See *Aluminum Co. of Am.*, 148 F.2d at 443 (finding that the Canadian corporation’s actions violated the Sherman Act). The Second Circuit held that the cartel’s agreement to maintain quotas on aluminum exported to the United States satisfied the intent requirement of the effects test. *Id.* With respect to the actual negative effect felt in the United States, the court held that “after the intent to affect imports was proved, the burden of proof shifted to ‘Limited’ [the Canadian corporation].” *Id.* As the court found that the government had not met its burden by showing an effect on imports, not that the Canadian corporation had proven the absence of an effect, this burden shift was decisive. *Id.* See also Gabriela Burghlelea, Note, *The Extraterritorial Application of Antitrust Law And the National Environmental Policy Act: A Comparative Study*, 8 GEO. INT’L ENVTL. L. REV. 351, 357-58 (1996) (discussing extraterritorial application of the Sherman Act in *Alcoa*).

132. See *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (concluding that “[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries,” and therefore is not unacceptable). The Supreme Court in *Continental Ore* found that the defendants’ deliberate monopolistic control of the vanadium ore industry caused forbidden results within the United States and hence was within the jurisdiction of U.S. courts; therefore, the defendants could be punished for violations of U.S. laws. See *id.* at 705 (finding *Alcoa* applicable since the defendants’ activities had a negative effect within the United States); see also *id.* (finding “[a] combination entered into with the United States to monopolize an article of commerce produced abroad was held to violate the Sherman Act although discriminatory legislation of the foreign country aided the defendants’ control of that production”).

The Court found that since the acts of the defendants had an adverse effect within

criticism charged that the test neglected to give deference to notions of international comity.¹³⁴ Generally, international comity is a fairness doctrine by which the United States decides not to apply U.S. laws to other nations.¹³⁵ The hope and expectation is that these other nations will reciprocate and not apply their laws “unreasonably” to the United States.¹³⁶ Many foreign governments alleged the extraterritorial application of antitrust laws violated public international law, and therefore, opposed U.S. jurisdictional assertions.¹³⁷ As it became increasingly apparent that the “effects” test failed to consider problems of international comity, there was the need for a more responsive standard.¹³⁸

the United States and upon its foreign trade, the *Alcoa* “effects” test was held controlling. *Id.* See also *Fleischmann Distilling Corp. v. Distillers Co. Ltd.*, 395 F. Supp. 221, 227 (S.D.N.Y. 1975) (further modifying the extraterritorial application of the Sherman Act by finding that “[t]he intent requirement, [part of *Alcoa*’s ‘effects’ test,] is a general intent to affect commerce, ‘and may be satisfied by the rule that a person is presumed to intend the natural consequences of his actions’”) (citations omitted). *Fleischmann* involved a suit by two domestic companies against three foreign companies. *Id.* The domestic companies, pursuant to the terms of a distributorship agreement, were the exclusive American distributors of scotch whiskey manufactured by the defendants. *Id.* at 233. Upon termination of the distributorship, plaintiffs filed a complaint alleging that the defendants conspired to impose unreasonably short terms for distributorship and notices of termination provisions in violation of the Sherman Act. *Id.* at 226.

133. See JAMES R. ATWOOD & KINGMAN BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 6.09 (1981) (noting that a “weakness of the *Alcoa* analysis was its perceived failure to take into account the possible legitimate interests of other nations affected by an exercise of extraterritorial jurisdiction”); see also Michael F. Kelley, *The Prescriptive Jurisdictional Reach of U.S. Antitrust Law: Judge Learned Hand’s Requirement of a “Substantive Anticompetitive Effect”*, 23 U. MIAMI INTER-AM. L. REV. 195, 236 (1991) (“Many foreign governments and commentators have severely criticized the *Alcoa* decision as being in violation of international law, in large part, due to an improper reading of a mechanical effects test into the decision.”).

134. See *supra* note 105 (defining the concept of international comity).

135. See Peter Durack, *Australia: Conflicts and Comity*, in *ACT OF STATE AND EXTRATERRITORIAL REACH: PROBLEMS OF LAW AND POLICY* 43 (John R. Lacey ed., 1983) (“[International c]omity is a way of saying fair play—that each of two parties will yield to the one that has interests that are clearly paramount. It is a word signifying a concern for common decency in conduct towards others.”).

136. See generally *id.* (stating that in deferring to the concept of comity, a nation should “give good faith consideration” to other nations).

137. See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 *LAW & POLY INT’L BUS.* 1, 32 (1992) (indicating that the broad extraterritorial application of U.S. antitrust laws to conduct occurring abroad did not win international acceptance). A number of the United States’ major trading partners, most notably those in Europe dealing in shipping, watch making, synthetic fibers, petroleum, hard metals and newsprint, enacted blocking statutes and other laws designed to prevent the extraterritorial application of the U.S. antitrust laws. *Id.* at 33.

138. See, e.g., *Mannington Mills Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979) (“When foreign nations are involved . . . it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.”).

2. *Limitations of the “effects” test and foreign response to the extraterritorial application of U.S. antitrust laws*

In response to the foreign resentment caused by the “effects” test set forth in *Alcoa*, U.S. courts began to advance jurisdictional tests¹³⁹ that incorporated the principle of international comity.¹⁴⁰ These tests balanced the interests of the United States in regulating anti-competitive activity against the legitimate sovereignty interest of other nations.¹⁴¹ For example, in 1976, the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*,¹⁴² explicitly recognized United States interests in international comity.¹⁴³ The court held the exercise of extraterritorial jurisdiction should always be reasonable in addition to finding an intended and actual effect on U.S. commerce.¹⁴⁴

The Ninth Circuit in *Timberlane*, analyzed the Sherman Act’s extraterritorial jurisdictional jurisprudence and in turn expanded the “effects” test pronounced in *Alcoa* to include the requirement that courts consider the concept of international comity before exercising

139. For example, two Supreme Court decisions have found that U.S. jurisdiction under the Sherman Act can be asserted on foreign corporations engaging in anti-competitive behavior that takes a direct toll on the United States. In *Continental Ore*, the Court held that corporations charged with conspiracy to restrain trade “are not insulated [from U.S. antitrust laws] by the fact that their conspiracy involved some acts by the agent of a foreign government.” *Id.* 370 U.S. at 706. The *Continental Ore* Court upheld jurisdiction over a U.S. company’s Canadian subsidiary that had restrained the export sales of another U.S. company. *Id.* at 710. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), the Court found that foreign and U.S. corporations engaged in anti-competitive behavior occurring partly within and partly outside the United States are subject to U.S. jurisdiction under the Sherman Act if the challenged behavior has an anti-competitive effect in the United States. *Id.* at 118-19.

140. *Compare* *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (defining comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”), *with* *Maier*, *supra* note 105 and accompanying text (describing comity as abstention from suit against another nation when both nations have legitimate jurisdiction).

141. *See* *Alford*, *supra* note 122, at 215 (noting courts’ efforts taken in response to the hostility the “effects” test provoked abroad); *see also* Edward L. Rholl, Comment, *Inconsistent Application of The Extraterritorial Provisions of the Sherman Act: A Judicial Response Based Upon the Much Maligned “Effects” Test*, 73 *MARQ. L. REV.* 435, 442-43 (1990) (arguing that “once the extraterritorial reach of the Sherman Act was established in *Alcoa*, courts felt compelled to refine the broad test outlined by Judge Hand to gauge the extent of the effects and the nature of intent necessary to invoke subject matter jurisdiction”).

142. 549 F.2d 597 (9th Cir. 1976).

143. *See id.* at 613-15 (noting that when a case presents a conflict of international laws, comity interests should be evaluated).

144. *See id.* at 613 (finding that “there is the additional question [of reasonableness] which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”).

jurisdiction.¹⁴⁵ The *Timberlane* court determined that a tripartite analysis was the appropriate means of determining whether U.S. antitrust laws should apply in that case.¹⁴⁶ Parts one and two were taken directly from the *Alcoa's* "effects" test.¹⁴⁷ Part one of the *Timberlane* test acknowledges antitrust laws require, in the first instance, there be some actual or intended effect on American commerce before federal courts justifiably may grant subject matter jurisdiction.¹⁴⁸ Part two requires a demonstration of evidence of the type and magnitude of the offense that is sufficiently large to represent a cognizable injury.¹⁴⁹ Under the third part of the *Timberlane* test, the court comprised a list of seven factors known as the "jurisdictional rule of reason,"¹⁵⁰ as an interest-balancing test designed to determine whether comity should deter the exercise of jurisdiction.¹⁵¹

145. See *id.* at 609 ("Extraterritorial application is understandably a matter of concern for the other countries involved."); see also Mark L. Seiden, Comment, *Antitrust Law—Extraterritorial Jurisdiction—Foreign Law Permitting Conspiracy to Restrain Trade Does Not Prevent Sherman Act's Extraterritorial Application*, *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891 (1993), 18 SUFFOLK TRANSNAT'L L. REV. 307, 311 (1995) (discussing the *Timberlane* court's balancing requirement for extraterritorial antitrust jurisdiction).

146. See *Timberlane*, 549 F.2d at 613 (articulating the requisites to asserting the Sherman Act extraterritorially); see also Margaret Holthusen, *U.S. Courts: Walking the Tightrope Between American Trade Interests and International Comity—Do The Factors Presented in Section 403 of the Restatement (Third) of Foreign Relations Law of The United States Facilitate the Determination of Extraterritorial Jurisdiction of United States Antitrust Law?*, 4 N.Y. INT'L L. REV. 60, 62 (1991) (analyzing how the *Timberlane* court expanded the "effects" test to include the need for more comprehensive and precise principles of jurisdictional restraint); ATWOOD & BREWSTER, *supra* note 133, § 6.05 (discussing the *Timberlane* court's balancing requirement for extraterritorial jurisdiction).

147. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945); see also ATWOOD & BREWSTER, *supra* note 133 (describing the *Timberlane* court's employment of *Alcoa's* "effects" test).

148. See *Timberlane*, 549 F.2d at 613 (restating part one of the *Alcoa* court's "effects" test).

149. See *id.* (restating part two of the *Alcoa* court's "effects" test).

150. See *id.* The court proposed the following comity factors to determine if foreign interests outweigh United States' interests:

- (1) the degree of conflict with foreign law or policy;
- (2) the nationality or allegiance of the parties and the locations or principal places of business of corporations;
- (3) the extent to which enforcement by either state can be expected to achieve compliance;
- (4) the relative significance of effects on the United States as compared with those elsewhere;
- (5) the extent to which there is explicit purpose to harm or affect American commerce;
- (6) the foreseeability of such effect; and
- (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614.

151. See *id.* at 613-14 (presenting factors to be considered in jurisdictional analysis); see also William N. Friedler, Comment, *Antitrust Law—Court Must Consider International Comity in Exercising Jurisdiction Under Sherman Act*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979), 4 SUFFOLK TRANSNAT'L L.J. 185,

Timberlane was the first meaningful endeavor to create a rule of U.S. antitrust jurisdiction that took international concerns fully into account.¹⁵² Several circuit courts have recognized the *Timberlane* interest balancing test and varieties thereof as an appropriate mechanism both to consider international comity and to decide whether to assert extraterritorial antitrust jurisdiction.¹⁵³ While the Supreme Court has yet to rule on the appropriateness of this balancing test,¹⁵⁴ the Court has considered foreign laws' impact on

189 (1980) (discussing the *Timberlane* court's recognition of international comity in evaluating whether to assert jurisdiction based on an extraterritorial application of the Sherman Act, and the seven factor analysis that emanated from that decision).

152. See *Timberlane*, 549 F.2d at 613 (noting that international comity and fairness, in addition to an effect on U.S. commerce, are necessary factors in determining whether to assert the Sherman act extraterritorially); see also John H. Chung, Comment, *The International Antitrust Enforcement Assistance Act of 1994 and the Maelstrom Surrounding the Extraterritorial Application of the Sherman Act*, 69 TEMP. L. REV. 371, 394 (1996) (explaining the *Timberlane* court's sentiments of necessity of evaluating foreign interests).

153. See Joseph P. Griffin, *Justices Finally Tackle "Foreign Conduct"*, NAT'L L.J., Aug. 9, 1993, at 29 (listing circuits that adhere to the *Timberlane* analysis); Grippando, *supra* note 124, at 409 (noting that subsequent courts adopted the test set forth in *Timberlane* in several forms); see, e.g., *Indust. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884-85 (5th Cir. 1982) (applying the interest balancing test to hold that antitrust laws should not be applied in violation of international comity); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981) (adopting and adhering to the *Timberlane* test); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (finding that comity concerns should be part of jurisdictional determination); *Daishowa Int'l v. N. Coast Export Co.*, 1982-2 Trade Cas. (CCH) P 64,774, at 71,789 (N.D. Cal. 1982) (finding that comity analysis is an important part of jurisdictional determination). *But see* *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 950-53 (D.C. Cir. 1984) (rejecting the balancing approach and concluding that a judicial balancing of competing foreign and domestic interests would be improper).

In *Mitsui*, the court viewed the balancing test as an abstention doctrine rather than a jurisdictional test. See *Mitsui*, 671 F.2d at 884-85. In *Montreal Trading*, the Tenth Circuit found no set of factors exclusive in deciding whether to dismiss an extraterritorial antitrust action. See *Montreal Trading*, 661 F.2d at 869-70. In *Mannington Mills*, the Third Circuit expanded the seven-factor list, and stated ten factors to be analyzed to determine if extraterritorial jurisdiction should be asserted. See *Mannington Mills*, 595 F.2d at 1297-98. The three additional extraterritorial jurisdiction criteria catalogued by the *Mannington Mills* court included "[w]hether the court can make its order effective; [w]hether an order for relief would be accepted in this country if made by the foreign nation under similar circumstances; [and] [w]hether a treaty with the affected nations has addressed the issue." *Id.* The court altered the analysis by separating the questions of jurisdiction and comity, as it considered comity an abstention doctrine used to determine whether jurisdiction should be exercised. *Id.* at 1294.

154. See Deanna Conn, Note, *Assessing the Impact of Preferential Trade Agreements and New Rules of Origin on the Extraterritorial Application of Antitrust Law to International Mergers*, 93 COLUM. L. REV. 119, 146 (1993) (discussing the split in circuits, which the Supreme Court has yet to resolve, over the *Timberlane* court's balancing approach); Holthusen, *supra* note 146, at 63 (stating that the Supreme Court has not yet ruled on interest balancing in an antitrust context); ATWOOD & BREWSTER, *supra* note 133, § 6.11 (asserting that the *Timberlane* court's analysis lacks Supreme Court approval).

the jurisdictional reach of the Sherman Act.¹⁵⁵

D. Hartford Fire and the Death of Comity

The Supreme Court's 1993 decision in *Hartford Fire* was a profound departure from the trend established by the Ninth Circuit in *Timberlane*.¹⁵⁶ In *Hartford Fire*, the Court did not expressly rule on the availability of comity to dismiss a claim brought under the extraterritorial reach of the Sherman Act,¹⁵⁷ but the Court did erect a formidable barrier to the use of a comity analysis.¹⁵⁸ Accordingly, rather than employing the *Timberlane* comity analysis, the Supreme Court held that the pertinent question to ask was, "whether there is in fact a 'true conflict' between domestic and foreign law."¹⁵⁹ No true conflict exists "where a person subject to regulation by two states can comply with the laws of both."¹⁶⁰ Consequently, in holding that

155. See *Cont'l Ore. Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705-07 (1962) (considering the impact of foreign laws on the extraterritorial application of United States antitrust laws); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (assessing the effect of foreign legislation upon United States antitrust jurisdiction).

156. See Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity?*, 15 U. PA. J. INT'L BUS. L. 221, 223 (1994) (noting that the long adhered to theories of domestic conflict of laws in determining whether to apply U.S. antitrust law extraterritorially have been thwarted by the ruling in *Hartford Fire*).

157. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797 (1993) (discussing how the Court declined to rule on the issue of comity). In *Hartford Fire*, nineteen states and various private parties filed suit against several domestic insurers, as well as a conglomerate of London reinsurers, alleging an international conspiracy to restrict the commercial insurance market. *Id.* at 774-76. The Court found that the only substantive issue was whether the disparity between British law and United States law supported dismissal. *Id.* at 798. Justice Souter, joined by Chief Justice Rehnquist, and Justices White, Blackmun and Stevens, held that since the alleged foreign conduct at issue was, "meant to produce and did in fact produce some substantial effect in the United States," the Sherman Act applied to that foreign conduct. *Id.* at 796. See also *United States v. Sisal Sales Corp.*, 274 U.S. 268, 273-75 (1927) (finding that a conspiracy under foreign law, without more, is insufficient to bar the application of United States antitrust law to acts performed abroad). This is a well-reasoned analysis since a foreign nation's law should not be a concern where there are no substantive foreign interests to support dismissal of the action. See *In re Ins. Antitrust Litig.*, 938 F.2d 919, 932-34 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). The Ninth Circuit found that to dismiss the action against the London reinsurers solely on the grounds that British law allowed anti-competitive conduct would be to grant the British insurance industry a special immunity from U.S. antitrust laws, and comity does not require such a grant of immunity. *Id.* at 934.

158. See *Hartford Fire*, 509 U.S. at 813-15; see also Robert C. Reuland, *Hartford Fire Insurance Co., Comity, and the Extraterritorial Reach of United States Antitrust Laws*, 29 TEX. INT'L L.J. 159, 161 (1994) (noting that the *Hartford Fire* decision will result in foreign concerns not being given "proper account" in U.S. courts).

159. *Hartford Fire*, 509 U.S. at 798 (quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 555 (1987) (internal quotations added)).

160. *Id.* at 799 (quoting RESTATEMENT (THIRD), *supra* note 130, § 403, cmt. e).

Hartford Fire presented no “true conflict,” the Supreme Court ruled that a U.S. court should not consider the interests of a foreign sovereign unless a “true conflict” exists between U.S. law and the law of the foreign state.¹⁶¹ Accordingly, *Hartford Fire* demonstrates that no jurisprudential obstruction precludes the application of U.S. antitrust law abroad.¹⁶²

The Court in *Hartford Fire* discarded *Timberlane*'s “jurisdictional rule of reason,” requiring satisfaction of the “true conflict” test before importing *Timberlane*'s comity analysis.¹⁶³ This significantly limited *Timberlane*'s applicability to future cases.¹⁶⁴ Indeed, the *Hartford Fire* restriction leaves only the “effects” test as a barrier to the extraterritorial application of U.S. antitrust jurisdiction.¹⁶⁵

161. See *id.* at 815 (finding that a “true conflict” exists only when foreign law requires a defendant to violate U.S. law or when compliance with both the law of the United States and that of the defendant's nation is impossible). The Court also found that there existed no “true conflict” because foreign law did not require the defendants to act in some fashion prohibited by U.S. law and because compliance with both U.S. and foreign law was not impossible. See *id.*

In his dissent, Justice Scalia, joined by Justices O'Connor, Kennedy and Thomas, voiced sharp disagreement with the Court's “conclu[sion] that no ‘true conflict’ counseling nonapplication of United States law . . . exists unless compliance with United States law would constitute a violation of another country's law.” *Id.* at 820. Justice Scalia referenced several circuit court cases, including *Timberlane* and *Mannington Mills*, in support of his assertion that international comity concerns were proper when attempting to extend enforcement of the Sherman Act extraterritorially. *Id.* at 817. The dissent further argued that under the factors set forth in Section 403 of the Restatement (Third), any “nation having a basis for jurisdiction to prescribe a law must refrain from exercising that jurisdiction” if such an exercise of jurisdiction would be unreasonable. *Id.* at 818. In Justice Scalia's view, comity is not a doctrine of judicial abstention, which allows a court discretion to determine whether it should exercise or decline jurisdiction in light of competing international concerns. See *id.* at 818 n.9.

162. See *id.* at 798-99 (discussing the means by which the United States can exercise the Sherman Act extraterritorially).

163. See *id.* at 818-20 (determining that where there is no conflict between the laws of the United States and the nation against which the United States seeks to file suit, there is no need to weigh factors of comity).

164. See generally *id.* at 797-99 (addressing the mootness of comity analysis as promulgated in *Timberlane*).

165. The Court in *Hartford Fire* adopted the “effects” jurisdictional standard as promulgated by Congress in Title IV of the Export Trading Company Act of 1982, entitled the Foreign Trade Antitrust Improvements Act of 1984 (“FTAIA”). See 15 U.S.C. § 6a (1994 & Supp. IV 1998). FTAIA gives federal courts subject matter jurisdiction over conduct having a “direct, substantial and reasonably foreseeable effect” upon U.S. commerce. *Id.* While the language of the FTAIA stipulates that it is applicable solely to non-import trade or commerce with foreign nations, “the Act’ jurisdictional standard is viewed as generally declaratory of the existing state of the law and may be seen, therefore, as congressional acknowledgment of effects jurisdiction.” Reuland, *supra* note 158, at 187 n.224 (referencing the “FTAIA in support of the general proposition that jurisdiction may be based on effects upon ‘U.S. interstate commerce, on import trade and commerce, or on the export trade or commerce of a person engaged in trade or commerce in the United States’”). The language of the FTAIA is codified as section 6a of the Sherman Act. See generally *supra* note 70 (providing that the Sherman Act applies when conduct involving trade

III. PLACING RESTRICTIONS ON EXTRATERRITORIAL ANTITRUST JURISDICTION BASED ON SOVEREIGN INTERESTS

Despite the sufficiency of the *Alcoa* “effects” test, as well as the elimination of an explicit analysis of international comity as delineated in *Hartford Fire*, various restraints still exist on the extraterritorial application of U.S. antitrust laws.¹⁶⁶ For example, U.S. courts traditionally have honored a sovereign nation’s authority to engage in its own economic initiatives.¹⁶⁷ The *Alcoa* court held acts committed overseas by foreign parties are subject to antitrust jurisdiction if those actions had a substantial and intended negative effect on U.S. commerce and were illegal under domestic antitrust laws.¹⁶⁸ Broadly speaking, *Alcoa* held that the Sherman Act applies to foreign activity if the elements of the “effects” test are met.¹⁶⁹ An attempt by a U.S. court to assert extraterritorial antitrust jurisdiction over a foreign nation, however, even after the court has acknowledged subject matter jurisdiction based on this test, may be restricted by the sovereign immunity¹⁷⁰ and act of state doctrines.¹⁷¹ Despite the existence of such doctrines, however, they have not substantially reduced the extent to which U.S. courts have asserted extraterritorial jurisdiction, notwithstanding international protest.¹⁷²

or commerce with foreign nations has a “direct, substantial, and reasonably foreseeable effect” on the United States).

166. See Gupta, *supra* note 102, at 2288 (asserting that a forbearance of comity analysis still may not be sufficient to assert the Sherman Act extraterritorially).

167. See Sandra C. Hymowitz, Note, *Extraterritorial Application of the Sherman Act to Foreign Corporations*, 11 DEL. J. CORP. L. 513, 525 (1986) (stating that a court does not have to exercise jurisdiction even where there was extraterritorial conduct and the court is not prevented from hearing the case on comity principles).

168. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (“[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has [negative] consequences within its borders which the state reprehends . . .”).

169. See *id.* at 444 (suggesting that the Sherman Act extends to cover acts abroad if the acts have an effect in the United States, and the effect was intended).

170. See generally Comment, *Sovereign Immunity of States Engaged in Commercial Activities*, 65 COLUM. L. REV. 1086, 1087 (1965) (discussing the historical approach to asserting jurisdiction over a sovereign nation). The concept of sovereign immunity was designed to insulate foreign states from private suits and has been justified on the ground that it avoids “international friction.” See *id.* (quoting Hersch Lauterpacht, *The Problems of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT’L L. 220, 240 (1951)).

171. See *infra* Part III.B (detailing the act of state doctrine’s limitation on jurisdictional immunity).

172. See Chung, *supra* note 152, at 383-84 (discussing the defenses a defendant in an antitrust action may assert in order to preclude jurisdiction).

A. *The Foreign Sovereign Immunities Act*

The doctrine of sovereign immunity controls the susceptibility of foreign states¹⁷³ to suit in U.S. courts.¹⁷⁴ It is a limitation on *in personam* or *in rem* jurisdiction rather than a substantive defense to antitrust suits.¹⁷⁵ The Supreme Court formulated the doctrine of foreign sovereign immunity in *The Schooner Exchange v. McFaddon*,¹⁷⁶ basing its decision on the “perfect equality and absolute independence of sovereigns” and the “common interest impelling them to mutual intercourse.”¹⁷⁷

This “absolute theory” of sovereign immunity began to attract criticism when it became apparent that nations were engaging in what were historically considered commercial activities,¹⁷⁸ and consequently could not be sanctioned in court.¹⁷⁹ In fact, under this “absolute theory” of sovereign immunity,¹⁸⁰ a foreign state is not amenable to any lawsuit in the courts of another foreign state without its consent.¹⁸¹ Consequently, as private commercial enterprises found

173. See 28 U.S.C. § 1603(a) (1994 & Supp. IV 1998) (“A ‘foreign state,’ . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).”); see also *supra* note 37 and accompanying text (describing the characteristics of an “agency or instrumentality” of a foreign state).

174. See generally *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992) (deciding whether actions taken by the Republic of Arg. warrant stripping that nation of its sovereign status); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (announcing that a foreign nation is immune from suit in the United States and, aside from certain exceptions, jurisdiction shall not be asserted over a foreign nation in a U.S. court).

175. See *Milliken v. Meyer*, 311 U.S. 457 (1940) (finding that where a defendant’s status as a foreign sovereign provides grounds for dismissal, a plaintiff may have no other forum in which to bring his action).

176. 11 U.S. (7 Cranch) 116 (1812).

177. *Id.* at 137. The Chief Justice held that, although a nation necessarily possessed exclusive and absolute jurisdiction within its own territorial boundaries, it implicitly waives jurisdiction over a foreign state’s agent or property in the absence of prior notice. See *id.* at 139.

178. See discussion *infra* Part III.A.1 (defining and exemplifying commercial activities).

179. See Backer, *supra* note 97, at 1251-52 (discussing the problems with the absolute theory of immunity); see, e.g., *The Pesaro*, 277 F. 473, 475-76 (S.D.N.Y. 1921), *vacated and dismissed for lack of juris.*, 13 F.2d 468 (S.D.N.Y. 1926), *aff’d sub nom. Berrizi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1926) (finding immunity of a foreign state entity, without distinguishing between its commercial and governmental acts).

180. The “absolute theory” of sovereign immunity makes no distinction between a state’s “governmental” acts and “private” acts. See Lauterpacht, *supra* note 170, at 221-29 (asserting that absolute immunity, the purpose of which was to avoid ‘international friction,’ began to stir up criticism given its far-reaching power).

181. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP’T ST.

that they were unable to resort to the judicial process for the resolution of ordinary disputes arising out of business dealings, they saw themselves at a distinct competitive disadvantage to state-owned commercial entities.¹⁸² In response to this problem, the State Department officially adopted the “restrictive theory” of sovereign immunity in 1952, which denied immunity to sovereign nations in cases arising out of commercial activity.¹⁸³ As suits involving the commercial activities of foreign nations became more prevalent, U.S. courts began to follow this theory and to apply this new approach.¹⁸⁴

In 1976, Congress broke new ground by officially codifying the “restrictive theory” of sovereign immunity when it passed the Foreign Sovereign Immunities Act (“FSIA”).¹⁸⁵ The FSIA stated that sovereign immunity extends only to claims arising out of activities that may be characterized as purely governmental as opposed to commercial.¹⁸⁶ The Act sets forth the exclusive standards used to decide all sovereign immunity issues raised in U.S. courts.¹⁸⁷ One innovation included in

BULL. 98485 (1952), and *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (app. 2 to opinion of White, J.) [hereinafter *The Tate Letter*] (announcing a need for a change in U.S. policy regarding sovereign immunity given the unworkability of the absolute theory).

182. See generally Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 STAN. J. INT’L L. 159, 162-63 (1996) (explaining the development and abandonment of the absolute theory of sovereign immunity).

183. See *The Tate Letter*, *supra* note 181. The State Department gave three reasons for this change in policy:

- (1) the increased international acceptance of the “restrictive theory,” and the consequent sentiment that if the United States was allowing itself to be sued in other countries on that theory, its courts should have the same jurisdiction over foreign sovereigns; (2) the fact that communist countries benefited from the absolute theory of sovereign immunity, which afforded immunity to state trading companies but not to private companies of capitalist countries; and (3) the fact that the growth of governmental involvement in commercial activities necessitated a practice that will enable parties doing business with them to have their rights determined by the courts.

Id.

184. See *id.* (recognizing that the courts were likely to follow the lead of the State Department, while not legally bound to do so).

185. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (codified as amended at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11 (1994 & Supp. IV 1998)).

186. See 28 U.S.C. § 1602 (1994 & Supp. IV 1998) (stating the general purpose of the FSIA).

187. See generally 28 U.S.C. §§ 1602-07 (1994 & Supp. IV 1998) (providing the standards for immunity of a foreign state from jurisdiction and the exceptions to these standards); see also *Arg. Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 443 (1989) (stating that the FSIA governs the issue of whether foreign states are immune in foreign courts); Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R.3d 322, 366 (1980) (considering the modern status of the rules dealing with the doctrine of immunity of a foreign sovereign in American courts).

the FSIA was the direct connection between the issue of immunity and the contacts that link the dispute with the United States.¹⁸⁸ The contacts with the foreign jurisdiction are of the utmost importance when deciding whether a U.S. court should exercise jurisdiction over an action brought against a foreign sovereign.¹⁸⁹ In principle, a government should be accountable in its country's courts for its actions.¹⁹⁰ It does not follow, however, that a government should be held accountable in a foreign court for a particular action.¹⁹¹ That determination depends upon balancing the interests of the forum state in the particular transaction and considerations of comity that might make it inappropriate for a foreign court to review the acts of a coequal sovereign.¹⁹²

1. *The commercial activity exception to sovereign immunity*

The draftsmen of the FSIA purported to have U.S. courts decide whether a foreign sovereign could be sued.¹⁹³ The general rule under the FSIA is that foreign states—including their agents and instrumentalities—are immune from the jurisdiction of U.S. courts if they engage in activities that are purely governmental.¹⁹⁴ Section 1604 of the FSIA presents this general rule, and provides that, subject

188. See 28 U.S.C. § 1605(a) (1994 & Supp. IV 1998) (providing that in certain circumstances a sovereign may lose its immunity if certain types of contacts with or acts having an effect within the United States exist).

189. See S. Jason Balesta, Comment, *The Cost Of Closure: A Reexamination Of The Theory And Practice Of The 1996 Amendments To The Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1266 (2000) (noting that to exercise jurisdiction over a foreign state, it is necessary to have a solid extraterritorial jurisdiction basis).

190. See generally 28 U.S.C. § 1602-07 (1994 & Supp. IV 1998) (implying that foreign nations and their governments are typically immune from suit in the United States and, therefore, should be held accountable only for their actions in the courts of their country).

191. See 28 U.S.C. § 1602 (1994 & Supp. IV 1998) (determining that claims against foreign nations shall not be adjudicated in the United States, subject to certain exceptions provided in the statute).

192. See generally *Underhill v. Hernandez*, 168 U.S. 250 (1897) (finding that considerations of comity underlay the concept of sovereign immunity).

193. See generally 28 U.S.C. §§ 1602-07 (1994 & Supp. IV 1998) (creating a presumption of immunity, yet subject to certain exception, foreign nations are held accountable for their actions that have an effect in the U.S. and consequently lose their immune status).

194. See 28 U.S.C. § 1604 (1994 & Supp. IV 1998) (declaring a foreign state shall be immune from the jurisdiction of U.S. courts if not subject to an exception to jurisdictional immunity); see also *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 288 (5th Cir. 1989) (finding that the FSIA is the exclusive means by which a foreign state may be sued in the United States); *Coleman v. Alcolac, Inc.*, 888 F. Supp. 1388, 1400 (S.D. Tex. 1994) (discussing the general rule of FSIA); *Ebrahim v. Shell Oil Co.*, 847 F. Supp. 65, 67 (S.D. Tex. 1994) (holding that an entity is immune from suit under the FSIA if it is an instrumentality of a foreign state); *Gibbons v. Republic of Ireland*, 532 F. Supp. 668, 671 (D.D.C. 1982) (stating that immunity of foreign states remains the rule rather than the exception and must be respected by the courts of the United States).

to existing international agreements between the foreign state and the United States at the time of enactment, a foreign state shall be immune from the jurisdiction of U.S. courts,¹⁹⁵ except as provided by sections 1605¹⁹⁶ and 1607.¹⁹⁷ By enacting these exceptions, Congress

195. See 28 U.S.C. § 1604 (1994 & Supp. IV 1998) (stating that exceptions to this section are contained in sections 1605 and 1607).

196. See 28 U.S.C. § 1605 (1994 & Supp. IV 1998). Section 1605 enumerates the general exceptions to section 1604:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication. . . ;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law . . . ;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . ;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate . . . ; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency

28 U.S.C. § 1605.

197. See 28 U.S.C. § 1607 (1994 & Supp. IV 1998). Section 1607(a) provides in part:

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim, (a) for which a foreign state would not be entitled to immunity under section 1605

28 U.S.C. § 1607(a). See also *Exp. Group v. Reef Indus.*, 54 F.3d 1466, 1469 (9th Cir. 1995) (holding that the FSIA creates the statutory presumption that foreign states and its agents and instrumentalities are immune from suit unless one of the specific exceptions enumerated in the Act applies); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992) (stating that foreign states, as a general rule, are immune to suit in the United States, subject to certain exceptions); *Bahsoon v. Pezetel, Ltd.*, 768 F. Supp. 507, 510 (E.D.N.C. 1991) (finding that under the FSIA immunity is the general rule and must be adhered to unless it is clearly

codified the “restrictive view” of sovereign immunity, thereby denying immunity in certain instances.¹⁹⁸

The commercial activity¹⁹⁹ exception, enumerated as one of the general exceptions under section 1605, remains the most ambiguous exception to sovereign immunity.²⁰⁰ The first sentence of the definition of commercial activity, found in section 1603, simply establishes that the commercial nature of an activity does not depend upon whether it is a single act or a regular course of conduct.²⁰¹ The second sentence specifies what element of the conduct determines commerciality, but still fails to define “commercial.”²⁰² Unfortunately, the FSIA has provided a rather tautological definition of commercial activity, offering no clear-cut distinction as to what separates a commercial activity from a governmental activity.²⁰³ There have, however, been a multitude of attempts and tests set forth by federal courts designed to clarify this uncertainty.²⁰⁴ The courts have been

shown that an exception applies).

198. “Certain instances” refers to the exception to jurisdictional immunity of a foreign state. *See generally* 28 U.S.C. §§ 1605-07 (1994 & Supp. IV 1998); *see also* *Republic of Argentina v. Weltover*, 504 U.S. 607, 610-11 (1992) (finding that foreign sovereigns are immune from U.S. jurisdiction “unless one of several statutorily defined exceptions applies”). When a foreign state engages in commercial activity it loses its immunity under the FSIA and becomes amenable to suit in the United States. *See id.*

199. 28 U.S.C. § 1603(d) (1994 & Supp. IV 1998).

A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by the reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d)

200. *See generally* Todd Connors, Note, *The Foreign Sovereign Immunities Act: Using Separation of Powers Analysis to Guide Judicial Decision-Making*, 26 LAW & POLY INT’L BUS. 203, 213-19 (1994) (discussing the lack of guidance provided as to what exactly is encompassed within a commercial activity); *see also* Jack Garvey, *Judicial Foreign Policy Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POLY INT’L BUS. 461, 463-68 (1993) (furthering the assertion that the text of the commercial activity exception is ambiguous and provides no clear cut standard by which to distinguish commercial activities from governmental activities).

201. *See* 28 U.S.C. § 1603(d) (1994 & Supp. IV 1998) (distinguishing between the nature and purpose of a commercial activity).

202. *Id.* *See also Weltover*, 504 U.S. at 614 (pointing out the ambiguity of the commercial activities exception); *cf.* *McDermott Int’l v. Wilander*, 498 U.S. 337, 342 (1990) (stating that “when a statute uses [a term of art], Congress intended it to have its established meaning”).

203. *See* Joan E. Donoghue, *Taking the “Sovereign” Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT’L L. 489, 499 (1992) (stating that the FSIA definition of commercial activity, under which either a regular course of conduct or a particular transaction may be considered commercial by reference to the nature of the activity, not its purpose, is tautological).

204. *See, e.g., Weltover*, 504 U.S. at 611 (using a three-step analysis based on the third commercial activity exception). First, the court decides whether the activity is commercial or sovereign in nature. *Id.* Second, if the court finds the activity to be

given enormous latitude to make this distinction, despite the guidelines set out in the legislative history of the FSIA.²⁰⁵ Ultimately, the courts will play the role traditionally played by the State Department in granting immunity.²⁰⁶

2. *Distinguishing between governmental and commercial activities: the nature v. purpose test*

To distinguish between a foreign state's governmental and commercial activities for purposes of determining sovereign immunity, a high standard of analysis must be in place.²⁰⁷ To facilitate this distinction, the United States, through the FSIA, developed the "nature versus purpose test."²⁰⁸ This test asserts that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or of the particular transaction or act, rather than referencing that activity's purpose.²⁰⁹ Under the

commercial, it determines whether the claim is based upon the commercial activity. *Id.* Third, the court decides whether the commercial activity has a sufficient connection or nexus with the United States. *Id.* The Court in *Saudi Arabia v. Nelson*, also applied the three-step commercial activity exception analysis, but noted, that while it used the three-step commercial activity analysis to make its determination, the FSIA is still too nebulous for determining whether a defendant foreign state's actions are clearly commercial in nature. 507 U.S. 349, 356-61 (1993). *See also* *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1278-79 (3d Cir. 1993) (delineating a two-part test to determine whether a foreign state's commercial activities are sufficient to deprive it of sovereign immunity under the commercial activity exception of the FSIA). The court in *Federal Insurance Co.* found that the "initial inquiry is whether there is a sufficient jurisdictional connection or nexus between the commercial activity and the United States; and the second inquiry is whether there exists a substantive connection or nexus between the commercial activity and the subject matter of the cause of action." *Id.* *See also* *Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A.*, 493 F. Supp. 621, 623 (S.D.N.Y. 1980) (enunciating that, "in order for the [commercial activity exception of the FSIA] to apply . . . suit must be based either upon the commercial activity of a foreign state carried on in the United States, an act performed in the United States by a foreign state in connection with its commercial activity elsewhere or a commercial act of a foreign state outside the United States which causes a 'direct effect' in the United States").

205. Examples of commercial activities in the legislative history of the Act include, "[a]ctivities such as foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation." H.R. REP. NO. 94-1487, at 17, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616 [hereinafter *House Report*].

206. *See* Comment, "Commercial Activity" *Under the Foreign Sovereign Immunities Act of 1976: Toward a More Practical Definition*, 34 BAYLOR L. REV. 295, 300-02 (1982) (commenting on the fact that the determination of whether an act is commercial or governmental is left up to the judiciary).

207. *See infra* notes 208-22 and accompanying text (analyzing the differences between a purely commercial and purely governmental activity).

208. *See* 28 U.S.C. § 1603(d) (1994 & Supp. IV 1998) (indicating that when determining whether an activity is commercial in nature, reference should be made to its nature as opposed to its purpose).

209. *See infra* note 212 and accompanying text (providing judicial precedent

purpose test, if the reason underlying the government's activities relates to a given sovereign obligation, then that government retains immunity.²¹⁰ Conversely, the nature test²¹¹ ignores the underlying reason, looking only to the nature of the transaction.²¹²

The FSIA expressly adopts the nature test, but the "key to a definition of "nature" for FSIA analysis, then, requires a distinction between the legal nature of private acts and the legal nature of governmental acts."²¹³ The benchmark case of *Texas Trading & Milling Corp. v. Republic of Nigeria*²¹⁴ illustrates how courts have interpreted the commercial nature of an activity.²¹⁵ The Second Circuit found, "if the activity is one in which a private person could engage, the sovereign is not entitled to immunity."²¹⁶ Under this so-called private person test,²¹⁷ if a private party has the legal right and power to engage in the same activity or commit the same act, the act or activity is

distinguishing between the nature and the purpose of a commercial activity).

210. See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Gov't Relations of the House Comm. on the Judiciary*, 94th Cong. 27 (1976) (testimony of Monroe Leigh, Legal Advisor, Dep't of State).

211. The nature test has been described as:

The distinction between acts [that have a public purpose] and acts [that have a private purpose] can only be based on the nature of the act of the State or of the resulting legal relation, not on the motive or the purpose of the activity. What is relevant is whether the foreign State acted in the exercise of its sovereign power.

Exemptions from Territorial Jurisdiction: Sovereign Immunity: 6 WHITEMAN DIGEST § 20, at 567.

212. See, e.g., *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 708-09 (9th Cir. 1992) (discussing the differences of the nature and purpose of a foreign states' activities). The nature of an activity is essentially the superficial make-up of what has been done. When examining the nature of an activity, there is no reference to why the act has been done, but only to the mere fact that it has been done. *Id.* The purpose, on the other hand, does in fact look to why an act has been done, as well as its core rationale. *Id.* The *Weltover* Court discussed the differences between nature and purpose of the commercial character of an act. See also *Republic of Arg. v. Weltover*, 504 U.S. 607, 614-17 (1992). The Court defined "nature" as the outward form of the conduct and "purpose" as the reason why the foreign state engages in the conduct. *Id.*

213. Steven H. Thomas, Note, *Two Faces of The Trader: Guidelines for Distinguishing Between Governmental and Commercial Acts Under The Foreign Sovereign Immunities Act of 1976*, 23 TEX. INT'L L.J. 465, 475 (1988) (noting what needs to be examined when distinguishing between the nature of a governmental activity and a commercial activity).

214. 647 F.2d 300 (2d Cir. 1981).

215. See *id.* at 308 ("If 'commercial activity' under § 1603(d) [of the FSIA] is present, and if it bears the relation to the United States required by § 1605(a)(2), then the foreign state 'is not entitled to immunity' . . .").

216. *Id.* at 309.

217. See *id.* (noting that an act is not entitled to immunity if it can be engaged in by a private person); see also *Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018, 1024 (9th Cir. 1987) (applying the "private person test" set forth in *Texas Trading*).

commercial.²¹⁸ If only a sovereign could commit the act or activity, it is considered governmental in nature.²¹⁹

Each of the foregoing principles have yet to be compiled into a single test, and courts are still left with the painstaking task of deciding whether a sovereign's acts are commercial or governmental in nature.²²⁰ The Justice Department's *Antitrust Guide for International Operations*²²¹ notes that distinguishing between "sovereign" and "commercial" activities may be difficult and "may turn in part on questions of foreign law, custom, and practice."²²²

218. See *Tex. Trading & Mill Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 300 (2d Cir. 1981). The *Texas Trading* court instituted and applied the private party test to deny immunity to the Nigerian government. *Id.* The context of the case included money damages stemming from a contractual obligation to pay. *Id.* at 302. By refusing to uphold its contractual promises to pay, the Nigerian government caused pecuniary damage to all of the cement suppliers involved. *Id.* at 302. Nigeria's reasons for entering into or breaching the contracts are irrelevant, as are all of the other contractual provisions. *Id.* at 310. The money damages resulted from Nigeria's breach of a specific contractual provision and, because a private party would possess the legal right and power to bind itself similarly, Nigeria's activities were deemed commercial. *Id.* at 307-10; see also M. Mofidi, *The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: The Gulf Between Theory and Practice*, 5 J. INT'L LEGAL STUD. 95, 104-05 (1999) (describing the application of the "private person" test). See generally *In re Sedco, Inc.*, 543 F. Supp. 561 (S.D. Tex. 1982), *vacated*, 610 F. Supp. 306 (S.D. Tex. 1984), *remanded on other grounds sub nom. Sedco, Inc. v. PEMEX*, 767 F.2d 1140 (5th Cir. 1985) (finding that commercial damages include personal injury to residents and businesses along the Texas—Louisiana coastline). Because a private person would possess the legal right and power to drill an oil well, Pemex should not receive immunity under the FSIA. See *id.* at 565-66; see also *Republic of Arg. v. Weltover*, 504 U.S. 607, 614 (1992) (concluding when a foreign government acts a like private player in the market, its actions are commercial). The *Weltover* Court used a "private person" test, asking whether a private person could engage in the commerce the claim is based on. See *id.* at 613-14 (analogizing a foreign state to a private person to make a commercial activity determination); see also Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777, 780 (9th Cir. 1991) (finding an activity to be commercial if it normally is undertaken for profit and if the sovereign is not the only party capable of undertaking the activity); *Rodriguez v. Republic of Costa Rica*, 934 F. Supp. 493, 497 (D. P.R. 1996) (holding that under the commercial activity exception to sovereign immunity, an activity is commercial in nature if a private actor could take part in that type of activity).

219. See Thomas, *supra* note 213, at 475 (characterizing the difference between acts committed by private persons and acts committed by governments of foreign states).

220. See generally Stella Havkin, Note, *The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central De Nicaragua*, 10 HASTINGS INT'L & COMP. L. REV. 455 (1987) (providing an exposé on the differences between governmental and commercial activities of foreign nations).

221. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (Jan. 26, 1977), *reprinted in* ANTITRUST & TRADE REG. REP. NO. 799, (BNA) E-1 (Feb. 1, 1977) [hereinafter ANTITRUST GUIDE].

222. *Id.* at E-8 n.21.

B. *The Act of State Doctrine*

The act of state doctrine, a further limitation on jurisdictional immunity, is a court-imposed restraint encompassing the basic rule of customary international law that one country should not inquire into the validity of “governmental”²²³ acts of a foreign sovereign within its own territory.²²⁴ The doctrine recognizes the legal and physical consequences of all acts of state in other countries, acknowledging that the world is made up of independent sovereigns that possess exclusive power to govern by their own laws or decrees within their own national territorial boundaries.²²⁵

The Supreme Court first recognized the act of state doctrine as a limiting factor in assertions of jurisdiction in *Underhill v. Hernandez*.²²⁶ The Court found that “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one

223. See Conn, *supra* note 154, at 157 (elucidating the concept of a “governmental” activity). Conn writes:

[t]he applicability of the act of state doctrine depends on the nature of the foreign state action and on the extent to which essentially private restraints can be distinguished from private conduct that falls under the protective umbrella of government policy. This classification depends in part on whether the state’s activities can be characterized as ‘governmental’ as opposed to commercial.

Id. In *Alfred Dunhill of London v. Republic of Cuba*, a plurality opinion, the Court found that the Cuban government’s refusal to repay mistakenly paid funds does not constitute an act of state or indicate that the intervenors had governmental, as opposed to merely commercial, authority for the refusal. See 425 U.S. 682, 683 (1976). It should be noted that because this portion of the opinion was excluded from Justice Powell’s concurrence and was rejected by the four dissenters, it is not binding Supreme Court precedent. See *id.* at 683. Given the analogous rationales underlying the concepts of sovereign immunity and the act of state doctrine, it should therefore follow that when the act of state doctrine is applied to certain acts of foreign states, the application of sovereign immunity should produce the same results. See *id.* at 683. If the defendant foreign state was denied sovereign immunity on the grounds that its action was commercial in nature, it would be inconsistent to grant the same immunity by applying the act of state doctrine. See *id.* Taking this approach would undeniably impede on the FSIA’s intention of making purely commercial actions justiciable. *Id.* at 700-06. Cf. ANTITRUST GUIDE, *supra* note 221, at 55 (taking the position that the act of state doctrine does not apply to the “commercial” actions of a foreign government or instrumentality).

224. The act of state doctrine differs from the sovereign immunity defense in that the latter involves the exemption of a party from suit because of its status, whereas, the former is merely a choice of law question, i.e., a U.S. court will accept the validity of a law of a foreign state in reviewing conduct of the foreign sovereign which occurred within its own territory. See *Alfred Dunhill*, 425 U.S. at 705-06 n.18.

225. See Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can they Coexist?*, 13 MD. J. INT’L L. & TRADE 247, 251 (1989) (noting that the act of state doctrine is “a principal of judicial restraint, essentially to prevent disrespect for foreign states). The policy underlying the act of state doctrine is that courts should abstain from actions that hinders the executive branch in conducting foreign relations and that might imperil harmonious relations with other nations. See 45 AM. JUR. 2D *International Law* § 51 (1999) (proffering that courts should refrain from engaging in actions that might strain amicable relations with other nations).

226. 168 U.S. 250 (1897).

country will not sit in judgment on the acts of the government of another done within its own territory.”²²⁷ In 1964, in *Banco Nacional de Cuba v. Sabbatino*,²²⁸ the Court revisited *Underhill* and intervening cases, and in its decision, added the “Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, [subject to certain possible limitations].”²²⁹

In deciding cases such as *Sabbatino*, the Court’s purpose is two-fold. First, the Court seeks to emphasize constitutional issues that relate to the separation of powers between the judicial and political branches of government on matters of foreign affairs.²³⁰ Second, the Court endeavors to consider the notion of comity with respect to the applicability of the act of state doctrine, as declared in *Timberlane*.²³¹

In sum, the act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments.²³² Instead, it necessitates that, in the process of deciding whether an act is governmental or commercial, the purely governmental actions of foreign states, undertaken within their own jurisdictions, shall be deemed valid.²³³

227. *Id.* at 252. The plaintiff in *Underhill* sought to recover damages for tortious acts committed by the commander of a revolutionary army in Venezuela. *See id.* at 250-51. These acts allegedly had transpired during an insurgent overthrow of the Venezuelan government. *Id.* The plaintiff alleged a clear economic impact for which United States law offered remedy, yet because the United States officially recognized the defendant’s revolutionary party, the defendant’s conduct represented acts of a sovereign nation occurring within its own borders. *Id.* at 254. Consequently, the United States did not “sit in judgment” on the acts committed by the defendant. *Id.*

228. 376 U.S. 398 (1964).

229. *Id.* at 428 (balancing considerations to be taken into account when determining which political branch is most suited to handle issues dealing with foreign relations).

230. *See generally* Russ Schlossbach, Note, *Arguably Commercial, Ergo Adjudicable?: The Validity of a Commercial Activity Exception To the Act of State Doctrine*, 18 B.U. INT’L L.J. 139, 160 (2000) (finding that a case-by-case analysis is appropriate when dealing with the prudential question of whether a court should adjudicate a case “where sensitive international policy issues are at stake”). Justice Harlan suggests that the act of state doctrine offers a means of appreciating constitutional separation of powers issues, and notes that a grant of jurisdiction despite the Executive’s determination to forgo a suit may offend separation of powers. *See Sabbatino*, 376 U.S. at 432-33.

231. *See Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 615-16 (9th Cir. 1976) (weighing international comity interests against those interests that a jurisdiction-seeking nation may have in “providing the means of adjudicating disputes or claims that rise within its territory”) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965)); *see also supra* text accompanying notes 134-36 (discussing the rationale behind adherence to the notion of international comity).

232. *See generally* Achebe, *supra* note 225, at 251-52 (recognizing the true function and purpose of the act of state doctrine).

233. *See W.S. Kirkpatrick & Co. v. Env’tl. Tectonics Corp.*, 493 U.S. 400, 405-06 (1990) (enunciating that the act of state doctrine only applies in cases where to adjudicate “would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory”).

IV. CAN U.S. ANTITRUST LAW BE APPLIED EXTRATERRITORIALLY TO ASSERT JURISDICTION OVER OPEC?

Abolition of the foregoing jurisprudential hurdles to the extraterritorial application of U.S. antitrust law may be a lofty and seemingly unrealistic goal. However, given the current global economy, there is a need for effective transitional enforcement of U.S. antitrust law.²³⁴ Yet, actions of foreign sovereigns not falling within the purview of the aforementioned exceptions to subjection of U.S. antitrust law remain immune from suit. Given that, this Comment shall now focus on the issue at hand: should current laws be altered so as to quash the safeguards protecting OPEC from being subject to antitrust prosecution in the United States?

A. *The First and Final Attempt at Taking Action Against OPEC: International Association of Machinists and Aerospace Workers v. OPEC*

In 1979, the International Association of Machinists and Aerospace Workers ("IAM"), an American labor union, brought an antitrust action in the U.S. District Court for the Central District of California challenging the price-fixing activities²³⁵ of OPEC and its then thirteen member nations, naming each nation and OPEC as defendants.²³⁶ IAM sought monetary and injunctive relief for alleged price fixing of crude oil in violation of the Sherman Act.²³⁷ The actual injury plaintiffs alleged was the payment of exorbitant prices for gasoline at station pumps, by virtue of the anti-competitive actions taken by OPEC and the antitrust violations involved.²³⁸ The district court, however, denied jurisdiction on the grounds that the suit against

234. See WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESS 7:50 (James J. Garrett ed., 1997) (stating that the day has passed in which a company need be concerned only with the antitrust laws of its own country).

235. See *supra* notes 53-54 and accompanying text (discussing the oil crises of the 1970s).

236. The defendants did not appear in the district court proceedings. See Int'l Ass'n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries, 477 F. Supp. 553, 559-60 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981). Their position was argued to the court by amici and additional information was supplied by court appointed experts. See *id.* At the time of this lawsuit, Gabon and Ecuador were members of OPEC. See *id.* at 558-59. However, Ecuador, in 1992, and Gabon, in 1995, withdrew their membership, consequently leaving OPEC with its current eleven member nations.

237. See *IAM v. OPEC*, 477 F. Supp. at 558. The plaintiffs alleged that these price setting activities violated Section One of the Sherman Act, under which price-fixing has been a *per se* violation. See *id.*

238. See *id.* at 559 (stating the causes of action for which the plaintiffs brought suit).

OPEC and its member nations was barred by sovereign immunity.²³⁹

Central to the district court's judgment was its finding that OPEC's alleged price fixing was a governmental rather than commercial act.²⁴⁰

The court held that OPEC's purpose in setting oil prices was to ensure control of the member nations' natural resources, a sovereign function.²⁴¹ On appeal, the Ninth Circuit Court of Appeals affirmed dismissal of the suit but on different grounds.²⁴² While not deciding the issue of whether OPEC enjoys sovereign immunity, the Ninth Circuit instead held the act of state doctrine barred jurisdiction.²⁴³

The court noted its holding was motivated by an unwillingness to rule on delicate matters of foreign policy, especially where the executive and legislative branches have chosen to approach a given case with restraint.²⁴⁴

239. *Id.* at 565-70 (insisting that OPEC's actions fell within the purview of those actions allowable by a sovereign nation). The district court's resounding determination that OPEC's acts are purely governmental is not without its faults. *See id.*

240. *See id.* at 566-67 (acknowledging that while the standards of the FSIA are nebulous, the nature of the activity in which OPEC and its member-nations engaged is the only one in which a sovereign can engage).

241. *See IAM v. OPEC*, 477 F. Supp. at 567 (finding that "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" is essentially a governmental function). The court found that a sovereign has the sole power to control its natural resources. *See id.* The court also noted that OPEC's control over their oil resources "is a sovereign function because oil, as their primary, if not sole, revenue producing resources," is vital to the well-being of their nations' peoples. *Id.* at 568.

242. *Int'l Ass'n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries*, 649 F.2d 1354, 1355 (9th Cir. 1981).

243. *See id.* The Ninth Circuit found that OPEC qualified for act of state protection for two reasons: first the court said, "certain seemingly commercial activity will trigger act of state considerations" when they possess "a significant sovereign component;" second, the court concluded that, given the importance of oil in international relations, and the far-reaching attention given to this issue by the executive and legislative branches, it would be imprudent for the court to accept jurisdiction over the case. *Id.* at 1360-61.

244. *See id.* at 1361-62 (deciding that the court is not the appropriate branch of government to consider such sensitive areas as judging the legality of an act of a foreign state). *But see* Douglas H. Meal & Joel P. Trachtman, Comment, *Defenses to Actions Against Foreign States Under the United States Antitrust Laws*, 20 HARV. INT'L L.J. 583, 648 (1979) (asserting that while an executive suggestion likely would hold more weight than that of the judiciary, with respect to actions under act of state scrutiny, this "does not mean that it would override other[] [suggestions] which might outweigh them in a given case"). By formulating a *per se* rule that would make executive suggestions dispositive clearly would be contrary to the act of state doctrine's goal of protecting against the embarrassment of deciding upon an issue that should be left up to a different branch of government to resolve. *See id.* To make this decision by utilizing a balancing test is much more desirable than making the executive suggestion dispositive. *See id.* at 649.

B. *Why OPEC Should Not Retain Sovereign Immunity*

At the district court level in *IAM v. OPEC*, Judge Hauk saw the problem as deciding whether OPEC's acts were commercial acts in the marketing and selling of oil, or as governmental acts with respect to setting terms of the removal of a major natural resource from the member-nations' territory.²⁴⁵ Judge Hauk's rationale,²⁴⁶ however, was flawed, and appropriately criticized by the Ninth Circuit.²⁴⁷ The central question in *IAM v. OPEC* was whether a foreign state was immune from commercial conduct in exercising sovereignty over its natural resources.²⁴⁸ The following presents the tension between OPEC's governmental and commercial capacities.

It is seemingly a governmental activity for foreign nations to regulate the extraction of petroleum from its own terrain by ensuring compliance with zoning, environmental, and other regulatory establishments.²⁴⁹ However, by sitting together in collusion to limit

245. See *IAM v. OPEC*, 477 F. Supp. at 567 (deciding that the issue at bar was whether extraction of natural resources was a sovereign right); see also Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 308 (1986) (assessing what constitutes commercial as opposed to governmental activities). The portion of the commercial activity exception most applicable to extraterritorial cartel activities that withholds sovereign immunity, is when the relevant government conduct takes place "outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and th[ose] act[s] cause[] a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (1994 & Supp. IV 1998). This phrase, the third clause of the commercial activities exception, provides an exclusive basis for jurisdiction when the commercial activity involves only the slightest contact with the United States; the contact need not be substantial. See *id.*

246. See E.C. Lashbrook, Jr., *Vertical Integration and Restraints by the Oil Producing Sovereigns: Antitrust Implications and Supply Considerations*, 13 N.Y.U. J. INT'L L. & POL. 193, 207-09 (1980) (explaining the rationale behind Judge Hauk's opinion). Judge Hauk recognized that the FSIA provides no guidance for coming to a decision on the issue of whether OPEC should possess sovereign immunity. See *IAM v. OPEC*, 477 F. Supp. at 567-69. He referred to various resolutions and declarations from the United Nations affirming each state's "permanent sovereignty" over its natural resources. See *id.* He also was persuaded by the fact that the foreign states' were dependent financially on the capital the oil brought to their nation. See *id.*

247. The Court of Appeals was not persuaded by the reasoning of Judge Hauk. The Court of Appeals dismissed the holding that the foreign states were involved in noncommercial acts merely by finding that when dealing with an act of a foreign state that is neither definitively governmental nor definitively commercial, the act must be viewed in light of its nature (the act itself) rather than its purpose (the underlying impetus), as instructed by the FSIA. See *IAM v. OPEC*, 649 F.2d at 1357-58. However, that court failed to make a judgment on that issue, and dismissed the case on other grounds. See *supra* notes 243-44 and accompanying text (stating the rationale and holding of the Ninth Circuit in *IAM v. OPEC*).

248. Receipt of the revenues as profit from oil sales, rather than as taxes or royalties, seems more suggestive of their nature than the degree of fiscal dependence of the foreign state on the revenues. See David A. Brittenham, Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1487 (1983).

249. See generally Declaration of Permanent Sovereignty Over Natural Resources,

their oil production with the overriding goal of increasing prices, OPEC and its member nations are engaging in a commercial activity.²⁵⁰ The district court, when confronted with the contentions in the complaint that “these governments went on national television and announced they were fixing prices—a *per se* violation of the antitrust laws,”²⁵¹ in effect said, “[n]o, no[, y]ou forgot about the sovereign immunity defense. These are sovereigns, and they are immune because the activity they were engaging in was the preservation and maximization of profit from natural resources, a clearly sovereign activity. Therefore, they are immune.”²⁵² These statements further substantiate the flaw of the district court’s decision. The FSLA provides instructions to look at the nature of the

G.A. Res. 1803, U.N. GAOR Supp. No. 17 at 15, U.N. Doc. A/5217 (1962). This resolution recognizes “the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and . . . respect for the economic independence of States . . .” *Id.*

250. *See IAM v. OPEC*, 649 F.2d at 1357-61. OPEC’s argument, at the district court level can be reduced to a tripartite analysis: First, a government’s power to control the development and extraction of its natural resources is an inherent element of a foreign state’s sovereignty. *See id.* Second, specifying oil production levels as well as the prices at which the oil is set is an exercise of sovereign power, and hence governmental in nature. *See id.* Third, the governmental nature of setting prices and production levels does not expire when carried out collusively with other foreign states. *See id.* The first assertion is not being challenged here. OPEC’s second assertion fails to take into account that the means by which their first assertion is carried out, that is, the decisions underlying the levels at which prices and production are set, can be judged commercial. OPEC’s third assertion is altogether faulty as it falls short of recognizing the difference between the act of setting prices and production levels and the act of cooperatively coordinating production and, marketing strategies amongst all of its member-nations. *See IAM v. OPEC*, 649 F.2d at 1357-61. Even if price-fixing was not deemed a commercial activity, the commerciality of OPEC’s acts still would be satisfied because of the close connection between price-fixing and the sale of oil. The legislative history behind the FSLA explicitly defines the sale of a product as a commercial activity. *See House Report, supra* note 205, at 16.

251. Joseph P. Griffin, *Special International Antitrust Doctrines and Defenses*, 60 ANTITRUST L.J. 543, 548 (1991) (providing support for why OPEC could not claim the sovereign immunity defense).

252. *Id.* *See also* Int’l Ass’n of Machinists & Aerospace Workers v. Org. Petroleum Exporting Countries, 477 F. Supp. 553, 553 (C.D. Cal. 1979), *aff’d on other grounds*, 649 F.2d 1354 (9th Cir. 1981). *But see* MOL v. Bangladesh, 736 F.2d 1326, 1327 (9th Cir. 1984) (holding that the granting and revocation of a license to export a national resource constituted a sovereign act, and consequently finding a lack of jurisdiction). This case distinguished *IAM v. OPEC*, because in *MOL*, the defendant foreign state had a contractual agreement whereby MOL was to utilize rhesus monkeys, the natural resource in that case, for medical and other scientific research. *See id.* MOL breached its agreement, allowing Bangladesh to cease exportation of the monkeys, and MOL subsequently brought suit against Bangladesh. *See id.* at 1327-28. The suit was dismissed eventually, and the Ninth Circuit reasoned that Bangladesh was terminating an agreement that only a sovereign could have made. *See id.* at 1329. This agreement was not just a contract for trade of monkeys. It concerned Bangladesh’s right to regulate imports and exports, a sovereign privilege. *See id.* It did not, however, as did OPEC, restrict trade and inflate prices—Bangladesh clearly acted within its scope as a sovereign. *See id.*

activity, and not its purpose.²⁵³ The nature of OPEC's conduct was price-fixing, and, given OPEC's overriding concern of serving its own economic interests,²⁵⁴ it is indeed manifest that this conduct qualifies as commercial under the FSIA.²⁵⁵

C. OPEC's Actions Should Not be Deemed Acts of State

A principal reason for the soaring energy prices in the United States is that international price-fixing has evaded review under U.S. antitrust law.²⁵⁶ The underlying rationale for this inaction results from foreign policy considerations and technical impediments in antitrust laws that prevent the effective enforcement of U.S. law with respect to international price-fixing in the energy market.²⁵⁷ Such policy and technical impediments include the uncertain act of state doctrine, "which has been used to bar a lawsuit directed at stopping the manipulation of energy supplies and prices because of concern that such litigation might interfere in the foreign policy of the United States."²⁵⁸

In *IAM v. OPEC*, the Ninth Circuit found that, notwithstanding the undeniably commercial character of its price setting and production-limiting activities, OPEC retained jurisdictional protection under the act of state doctrine.²⁵⁹ This was the first time a federal court, while recognizing the commercial nature of acts committed by a foreign state, accepted the act of state defense and dismissed the claim.²⁶⁰

253. See *supra* note 199 (indicating that in examining a commercial activity, reference must be made to its nature and not to its purpose).

254. See generally ALLEN, *supra* note 13, at xiii (explaining OPEC's underlying motive).

255. See *supra* text accompanying notes 208-12 (discussing the role of the nature versus purpose test in determining a commercial activity); see also 28 U.S.C. §§ 1603, 1605 (1994 & Supp. IV 1998) (defining commercial activity as a "regular course of commercial conduct or a particular commercial transaction or act").

256. See generally 146 CONG. REC. S1942 (daily ed. Mar. 30, 2000) (statement of Sen. Specter) (discussing the United States' failed attempts at stopping international price-fixing).

257. See Foreign Trust Busting Act, H.R. 4731, 106th Cong. (2000) (stating why crude oil prices have swelled and why no action has been taken to thwart its continuation).

258. *Id.*

259. See *supra* note 243 and accompanying text (maintaining that the act of state doctrine barred jurisdictional assertion over OPEC).

260. See *Int'l Ass'n of Machinists & Aerospace Workers v. Org. Petroleum Exporting Countries*, 649 F.2d 1354, 1360 (9th Cir. 1981) ("The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations.") (citation omitted). Prior cases that had found a foreign state's activities to be commercial in nature, thus denying immunity from suit, also had found that the act of state doctrine was not intended to override these considerations by relying on Congress' goal in enacting the FSIA to prohibit the

Moreover, as a general principle of asserting jurisdiction over a foreign state, verification of immunity under the FSIA is a necessary precursor to entertaining any other defenses.²⁶¹ The Ninth Circuit essentially deemed the act of state doctrine to be a rule of “jurisdictional immunity or abstention.”²⁶² Additionally, the act of state doctrine typically extends to the acts of a foreign state that are committed and have consequences within their own country.²⁶³ *IAM v. OPEC*, conversely, expanded the act of state notion to include acts that were not limited to its member nations’ borders, but extended to countries to which it provided services.²⁶⁴

“Since the 9th Circuit issued its opinion in 1981, there have been major developments in international law that impact directly on the subject matter at issue.”²⁶⁵ The 1990s witnessed an increase in the efforts to seek compliance with basic international norms of behavior

assertion of an act of state defense with respect to commercial activities. See House Report, *supra* note 205, at 20 n.1; see, e.g., *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380-81 (5th Cir. 1980) (maintaining that the act of state doctrine does not preclude judicial resolution of all disputes arising out of a commercial activity).

261. See 28 U.S.C. § 1330 (1994 & Supp. IV 1998); see, e.g., *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497, 500 (S.D.N.Y. 1985) (determining that under the FSIA, “the absence of sovereign immunity is essential for existence of subject matter jurisdiction, which, in turn, is necessary for the attainment of personal jurisdiction”).

262. JOSEPH DELLAPENA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 312 (1988) (proffering the possibility of the nullification of the commercial activity test under the FSIA if the act of state doctrine is applied in such a way that, commercial or not, the United States will abstain from scrutinizing such activities). The Ninth Circuit attempted to substantiate its holding by referring to the Supreme Court’s decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See *IAM v. OPEC*, 649 F.2d at 1359. The Court in *Sabbatino* recommended that absent a controlling international agreement binding both the United States and the Cuban governments, U.S. courts may be permitted to assess the legitimacy of a foreign state’s actions under international law. *IAM v. OPEC* is quite different from *Sabbatino*. *IAM v. OPEC* dealt with a claim in which the act of a foreign sovereign defendant violated domestic law, whereas *Sabbatino*, which dealt with the validity of an act of a nonparty foreign state under international law, had no application in the *IAM v. OPEC* decision. *Sabbatino* focused on the applicable substantive law in a case properly before a court having jurisdiction; *IAM v. OPEC* used the act of state doctrine to preclude the exercise of adjudicatory jurisdiction as opposed to deciding the merits of the case. See generally RICHARD A. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 409-17 (1970).

263. See William Harvey Reeves, *The Sabbatino Case: The Supreme Court of the United States Rejects a Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 *FORDHAM L. REV.* 631, 640-41 (1964) (stating that the act of state doctrine is the recognition by a country of the legal and physical consequences of all acts of state in other countries).

264. See *Iraq v. First Nat’l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965) (finding that United States courts are permitted to recognize the act of state doctrine “only if [those acts] are consistent with the policy and law of the United States.”) (quoting RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 46 (Proposed Official Draft, 1962)).

265. 146 *CONG. REC.* S1942-44 (daily ed. Mar. 30, 2000) (statement of Sen. Specter).

through international courts and tribunals.²⁶⁶ Additionally, as a result of the holding in *Hartford Fire* in 1993, the doctrine of international comity, a fundamental ingredient of the act of state doctrine, has been nullified.²⁶⁷ Given these considerations, a U.S. court electing to apply the act of state doctrine to a suit taken against OPEC today will most probably reach a different determination than reached by the Ninth Circuit nearly twenty years ago.²⁶⁸

D. OPEC's Actions Viewed in Light of the Effects Paradigms

As stated below, the Second Circuit Court of Appeals in *Alcoa* formulated the two-pronged "effects" test in order to establish federal jurisdiction over foreign companies.²⁶⁹ In its decision in *Hartford Fire* in 1993, the Supreme Court based its decision in part on the "effects" jurisdictional standard of the FTAIA, and examined whether the conduct at issue had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.²⁷⁰ In applying the prevailing law in the United States in *Hartford Fire* to the actions undertaken by OPEC, the conclusion that an action against OPEC is now possible becomes more readily apparent.

Under the *Hartford Fire* two-step test, a court will first determine whether it has subject matter jurisdiction over the claim, requiring it to consider whether the defendant intentionally caused substantial effects upon the United States.²⁷¹ OPEC openly manipulates the price

266. See *id.* (exemplifying his discussion with various suits adjudicated in international forums).

267. See *supra* Part II.D (providing a commentary on the downfall of the usage of international comity).

268. See 146 CONG. REC. S1942 (daily ed. Mar. 30, 2000) (statement of Sen. Specter) (noting the change in act of state applicability over past three decades); see also Meal & Tractman, *supra* note 244 and accompanying text (suggesting a different approach with respect to the usage of the act of state doctrine).

269. See *supra* notes 128-38 and accompanying text (discussing the "effects" test and the international resentment over its application).

270. See *In re Ins. Antitrust Litig.*, 938 F.2d 919, 932-34 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom.* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); see also *supra* note 70 and note 165 and accompanying text (providing a history of the FTAIA).

271. See 15 U.S.C. § 6a(1)(B) (1994) (addressing the applicability of the FTAIA). The House Judiciary Committee Report, however, indicates that the Act "does not affect the legal standards for determining whether conduct violates the antitrust laws." HOUSE COMM. ON THE JUDICIARY, LEGISLATIVE HISTORY TO THE FOREIGN ANTITRUST IMPROVEMENTS ACT OF 1982, H.R. REP. NO. 686, 97th Cong. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 [hereinafter cited as LEGISLATIVE HISTORY]. Considering OPEC's massive control of the oil market, its impact on the U.S. economy is both substantial and foreseeable and OPEC's contacts with the United States are sufficient to satisfy the personal jurisdiction requisites of the "direct effect" provision. See Terence J. Pell, Note, *The Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts*, 14 CORNELL INT'L L.J. 97, 101-02 (1981) (examining the "direct effect" provision of the FSIA).

of oil, and it calculatedly keeps energy prices high enough to fund its members' own economies.²⁷² However, it does not keep these prices too high, so as to keep the United States "hooked" on oil and to keep the United States from making renewable sources or other alternatives economical.²⁷³ America's devoted reliance on crude oil, most notably in the form of gasoline, demonstrates how OPEC's actions have substantially affected a significant number of American citizens.²⁷⁴ This is a manifest violation of U.S. antitrust law, and the United States' continued practice of excepting foreign states from its antitrust law has led to the undesirable perception that U.S. courts tolerate foreign anti-competitive conduct.

The second part of the *Hartford Fire* test declares that once a court determines that it has subject matter jurisdiction over a claim, it will then consider whether it ought to exercise this jurisdiction in light of principles of international comity.²⁷⁵ Recall that the Supreme Court in *Hartford Fire* held that a U.S. court should not consider the interests of a foreign sovereign unless there is a "true conflict" between U.S. law and the law of the foreign state.²⁷⁶ There being no battle of laws in the instant analysis, U.S. courts, under a *Hartford Fire* analysis, need not concern themselves with comity considerations to promote the dismantling of oil price-fixing arrangements between the members of OPEC. Decisions with respect to foreign relations should be left to Congress and not the courts.²⁷⁷

The "effects" jurisdictional standard strikingly parallels the subject matter jurisdiction component present in the "direct effect" provision of the FSIA's commercial activity exception.²⁷⁸ The FSIA criterion

272. See 146 CONG. REC. E1107-01 (daily ed. June 23, 2000) (extension of remarks of Rep. Gilman) (pointing out that OPEC is keeping oil prices at exceedingly high levels).

273. See *id.* (describing how OPEC ensures customer countries' dependence on oil by keeping prices from reaching heights at which customer countries would turn to other forms of energy).

274. See 146 CONG. REC. E1585-03, 1586 (daily ed. Sept. 25, 2000) (extension of remarks of Rep. Gilman) (noting that gasoline is an indispensable commodity under the virtual unilateral control of OPEC).

275. See LEGISLATIVE HISTORY, *supra* note 271, at 13 (discussing the implications of comity on a determination of the appropriateness of jurisdictional assertion). "If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court[']s ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction." *Id.* (citing *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976)).

276. See *supra* note 161 and accompanying text (discussing the holding of *Hartford Fire*).

277. See generally Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (arguing that the legislature should have the task of handling foreign relations).

278. See *supra* note 204 (asserting that for the commercial activity exception to apply to the acts of foreign nations, such activities must have a "direct effect" on the

likewise requires that the defendant foreign state's activities have a substantial and foreseeable effect on U.S. commerce.²⁷⁹ Consequently, under the "effects" jurisdictional standard, OPEC would fall under the realm of antitrust laws for the same reasons that their actions have a "direct effect" on commerce in the United States.

E. Recent Legislation Favoring Legal Action Against OPEC

While not taking any official action, Congress has duly recognized OPEC's reprehensible conduct and has begun efforts to cope with the serious problems resulting from the rise in the price of oil stemming from the activities of OPEC and its member countries.²⁸⁰ With oil prices at record high levels, and rising toward forty dollars per barrel, the United States' passivity with respect to OPEC's activities must end. The Clinton Administration's failure to consider amending the jurisprudential impediments has sent the clear signal to OPEC that the United States will tolerate price-fixing.²⁸¹ Moreover, OPEC's production quota not only hurts Americans financially, but also comes at a time when total U.S. reserves are at a twenty-four year low.²⁸² The following legislation represents recent efforts taken by

United States); *see also* *Adler v. Fed. Republic of Nig.*, 107 F.3d 720, 726 (9th Cir. 1997) (finding that a foreign sovereign's acts have "direct effect" in the United States, within the meaning of the commercial activity exception of the FSIA, if the effect follows as an immediate consequence of the defendant's activity); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237-38 (10th Cir. 1994) (asserting that under the "direct effect" exception to the FSIA, a foreign state is not immune from suit in any case in which the action is based on an act having taken place outside the United States in connection with the commercial activity of the foreign state elsewhere if the act causes a direct effect in the United States); *Tex. Trading & Mill Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 307-11 (2d Cir. 1981) (mandating that a determination of whether the effect of the act complained of in an action against a foreign sovereign is sufficiently direct and sufficiently within the United States for a U.S. court to exercise jurisdiction under the FSIA, the court should consider whether the effects are felt in the United States sufficiently that Congress would have wanted a U.S. court to hear the case).

279. *See supra* note 197 and note 204 and accompanying text (elaborating on the tests that must be passed and the criteria necessary for the assertion of jurisdiction over a foreign state).

280. *See infra* Parts IV.E.1-4 (discussing legislation proposing the abolishment of the legal impediments to bringing suit against OPEC).

281. *See* Press Release, House International Relations Committee, "Oil Producers in Clover While Our Consumers are in Hock," Gilman Tells Richardson (June 27, 2000), available at http://www.house.gov/international_relations/press/106sec/62prjun27.html (noting the Administration's passivity with respect to OPEC's "continued assault on [the United States'] free market system and antitrust norms . . .").

282. *See Energy Information Administration, OPEC Fact Sheet: Background*, available at <http://www.eia.doe.gov/emeu/cabs/ope.html> (last modified Oct. 6, 2000) (providing information obtained in a study by the EIA where U.S. oil reserves were found to have decreased significantly from 1.63 million barrels to 1.53 million barrels in under a year).

Congress to end the detrimental effect that OPEC's unfettered domination over the world oil market is having on the United States.

1. *The Foreign Trust Busting Act*

U.S. Representative Benjamin A. Gilman (R-NY), Chairman of the House International Relations Committee, is arguably the most vocal member of Congress with respect to taking action against OPEC.²⁸³ On June 23, 2000,²⁸⁴ Rep. Gilman introduced the Foreign Trust Busting Act ("FTBA").²⁸⁵ The FTBA would allow lawsuits to be brought against foreign energy cartels, where previously courts had dismissed these lawsuits based on the act of state doctrine.²⁸⁶ Rep. Gilman contended that tearing down the act of state barrier "would not upset [U.S.] foreign relations if such a case proceeded, and if it did, it would be worth it, given the potential that the enforcement of antitrust laws would have in busting up OPEC."²⁸⁷

2. *International Energy Fair Pricing Act of 2000*

In addition to the FTBA, Rep. Gilman introduced the International Energy Fair Pricing Act of 2000 ("IEFPA").²⁸⁸ "With the enactment of

283. See discussion *infra* pp. 33-36 (identifying Rep. Gilman as a major proponent of passing new legislation which attempts to apply legal pressure on OPEC and its members so as to force them to lessen their control over the international oil market).

284. Rep. Gilman introduced this bill on June 23, 2000, which was subsequently referred to the Committee on the Judiciary and to the Committee on International Relations, for a period to be determined by the Speaker. Foreign Trust Busting Act, H.R. 4731, 106th Cong. (2000). At the writing of this Comment, the 106th Congress was in session and no official determination had been made regarding this Act. Rep. Gilman does in fact intend on reintroducing this bill in the 107th Congress. Telephone Interview with Matthew Horn, Legislative Assistant for the Honorable Benjamin Gilman (July 19, 2001).

285. *Id.* The purposes of this bill are:

to establish that the foreign policy interest of the United States would be advanced, rather than impeded or complicated, if foreign entities, including foreign cartels and foreign countries participating in such cartels, were held responsible for energy supply and price manipulation that affects the United States economy; and to eliminate barriers to the effective application of United States antitrust laws to foreign entities that have manipulated energy supplies or prices.

H.R. 4731 § 3.

286. Enacting this bill would amend the Foreign Assistance Act of 1961 to provide that it is not contrary to U.S. foreign policy interest to bring an antitrust lawsuit asserting the manipulation of energy supplies or prices, and for other purposes. See H.R. 4731 (amending the Foreign Assistance Act of 1961).

287. 146 CONG. REC. E1107-01 (daily ed. June 23, 2000) (extension of remarks of Rep. Gilman).

288. International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. (2000). Rep. Gilman introduced this bill on June 23, 2000; it then was referred to the Committee on International Relations and the Committee on Banking and Financial Services, for a period to be determined subsequently by the Speaker. At the writing of this Comment, the 106th Congress was in session and no official

this measure, the Administration will no longer be able to . . . [tolerate] cartel-like behavior.”²⁸⁹ The IEFPA instructs the President to make a systematic review of his administration’s policies as well as those of all international organizations and international financial institutions, such as the IMF or World Bank, to guarantee that they are not in any way fostering the oil price fixing activities,²⁹⁰ policies and programs of OPEC.²⁹¹ If such organizations are found to be promoting the fixing of oil prices by OPEC, their U.S. representatives will oppose any loan, project, program, or financial assistance to any country that supports OPEC activities.²⁹²

3. *Oil Price Reduction Act of 2000*

Prior to introducing the FTBA and the IEFPA, Rep. Gilman proposed to introduce the Oil Price Reduction Act of 2000 (“OPRA”) in the House Committee on International Relations.²⁹³ In testimony before the Committee, Clinton Administration officials asserted that OPEC has restricted oil supplies to the market, thereby swelling prices, and further maintained that OPEC’s activities as a cartel are not in the national interests of the United States.²⁹⁴ The objective of the OPRA is to reduce, suspend, or terminate assistance under the Foreign Assistance Act of 1961²⁹⁵ and the Arms Export Control Act²⁹⁶

determination had been made regarding the IEFPA. Rep. Gilman does, however, have definite intentions on reintroducing this bill in the 107th Congress. Telephone Interview with Mathew Horn, Legislative Assistant for the Honorable Benjamin Gilman (July 19, 2001).

289. 146 CONG. REC. H1103-01 (daily ed. June 23, 2000) (extension of remarks of Rep. Gilman).

290. The term “oil price-fixing” is defined as “participation in any agreement, arrangement, or understanding with other countries that are oil exporters to increase the price of oil or natural gas by means of, inter alia, limiting oil or gas production or establishing minimum prices for oil or gas.” H.R. 4732 § (7)(2).

291. See 146 CONG. REC. H1585-03 (daily ed. Sept. 25, 2000) (extension of remarks of Rep. Gilman) (prefacing the text of H.R. 4732). This program would require the Administration to initiate a policy review of the extent to which international organizations recognize and or support OPEC and to take this relationship into account assessing the importance of the United States’ relationship to these organizations. It would set up a similar review of the programs and policies of the Agency for International Development to ensure that this agency has not indirectly or inadvertently supported OPEC’s policies and programs. See *id.*

292. See 146 CONG. REC. H1103-01 (daily ed. June 23, 2000) (extension of remarks of Rep. Gilman) (listing the goals of the International Energy Fair Pricing Act).

293. Oil Price Reduction Act of 2000, H.R. 3822, 106th Cong. (2000). This Act was adopted by the House International Relations Committee on March 15, 2000, and passed the House on March 22, 2000. As of the writing of this comment, this bill had not yet been reintroduced in the 107th Congress.

294. See H.R. REP. NO. 106-528, at 5 (2000) (describing the impetus for the proposal of the Oil Price Reduction Act).

295. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. §§ 2151-2431k).

296. Arms Export Control Act, Pub. L. No. 87-297, 75 Stat. 631 (codified as

to any country determined by the President to be engaged in oil price-fixing to the detriment of the U.S. economy.²⁹⁷ If the President concludes that OPEC members or other major non-OPEC oil producers²⁹⁸ are involved in price-fixing, he must undertake a concerted bilateral and multilateral diplomatic campaign to bring about the termination of oil price-fixing arrangements.²⁹⁹

4. NOPEC

Congress' most recent attempt to resolve the U.S. oil dilemma with OPEC includes a proposal to amend the Sherman Act to make oil-producing and exporting cartels illegal.³⁰⁰ The "No Oil Producing and Exporting Cartels Act of 2000" ("NOPEC"),³⁰¹ if enacted, would destroy all jurisprudential barriers to asserting jurisdiction over OPEC,³⁰² and would establish a bright-line rule for extraterritorial application of U.S. antitrust law to actions of foreign states.³⁰³

amended at 22 U.S.C. §§ 2551-2595c).

297. See H.R. REP. NO. 106-528, at 1 (stating the purpose of the Oil Price Reduction Act of 2000). The Oil Price Reduction Act requires that "[n]ot later than thirty days after enactment, the President shall report on the overall relationship [of the United States] with each country that is a major oil exporter, shall describe the nature of the coordination between these countries in regard to the effect that oil pricing and production has had on the U.S. economy," and provide a comprehensive review of options available to the President as part of the multilateral effort including the suspension, termination or reduction of assistance or arms sales to these same countries. See *id.* at 5-6.

298. See *supra* note 46 and accompanying text (providing information on non-OPEC oil producers).

299. See H.R. REP. NO. 106-528, at 5 (describing the proposed diplomatic efforts to be undertaken by the President in an effort to end price-fixing by any oil-exporting or oil-producing nation).

300. See *infra* note 301 (noting that passage of NOPEC would make OPEC's agreement to restrict oil supply illegal under U.S. law and would allow the Attorney General or the Federal Trade Commission to redress the problem by filing suit).

301. No Oil Producing and Exporting Cartels Act of 2000, S. 665, 107th Cong. (2001). NOPEC would, "for the first time, establish, clearly and plainly, that when a group of competing oil producers like OPEC agrees to act together to restrict supply or set prices they are violating U.S. law, and [NOPEC] will authorize the Attorney General or FTC to file suit under the antitrust laws for redress." See 147 CONG. REC. S3216-01 (daily ed. Mar. 30, 2001) (statement of Sen. Kohl). NOPEC was originally introduced in the Senate by Sen. Kohl as S. 2778, and in the House by Rep. Chabot as H.R. 5241, both during the second session of the 106th Congress. NOPEC was reintroduced in the Senate by Sen. Kohl during the 1st session of the 107th Congress as S. 665.

302. Such jurisprudential barriers include the act of state doctrine and sovereign immunity. See *generally* 146 CONG. REC. S5663-02, 5683 (daily ed. June 22, 2000) (statement of Sen. Kohl) (noting that with the passage of this Act, a suit against oil-exporting and oil-producing cartels would be possible).

303. "The purpose of NOPEC is simple and straightforward. It makes clear that U.S. enforcement agencies may bring antitrust enforcement actions against foreign states which violate antitrust laws in the production and sale of oil and other petroleum products, and . . . the courts have jurisdiction . . . to consider such cases." *Id.* at 5684 (statement of Sen. DeWine).

NOPEC would make it illegal for any foreign state³⁰⁴ to act collectively with any other foreign state or person³⁰⁵ to limit the production of oil, natural gas or any other petroleum product; to set or maintain the price of oil, natural gas or any other petroleum product; or, to take action in restraint of trade of oil, natural gas or any other petroleum product.³⁰⁶ NOPEC would also strip a foreign state of its sovereign immunity if it engaged in any of the foregoing activities,³⁰⁷ and would nullify the foreboding act of state doctrine.³⁰⁸ Given the far-reaching nature of NOPEC, it is unlikely that its passage will be met without significant modifications.³⁰⁹ Nonetheless, if NOPEC is passed, virtually each and every prior hindrance to asserting jurisdiction over OPEC would be surmounted.³¹⁰

F. Recommendations

U.S. courts cannot prosecute foreign sovereigns, and as a result, U.S. courts do not have authority to assert jurisdiction over foreign sovereigns. OPEC and its member nations are ostensibly and disconcertingly protected from prosecution under U.S. law,³¹¹ in that they are protected from the assertion of jurisdiction over them by U.S. courts.³¹² It is therefore vital to both the well-being of American consumers and the U.S. economy that the foregoing legislation be

304. See *supra* note 173 (defining the term "foreign state" as used in the FSIA to include political subdivisions of foreign states and agencies or instrumentalities of foreign states).

305. See *supra* notes 70, 77 (defining the terms "person" and "persons" as including corporations and associations for Sherman Act analysis).

306. See S. 665 § 2 (stating, in a proposed additional section to the Sherman Act, that it would be illegal and a violation of the Sherman Act for oil-producing cartels to limit production, set prices, or otherwise restrain trade of oil, natural gas, or petroleum). This proposed section of the bill would, if enacted, be inserted after Section 7 of the Sherman Act, as Section 7A. See S. 665 § 2 (stating that section 7A, would be added after Section 7 of the Sherman Act, 15 U.S.C. §§ 1-7).

307. See *id.* § 2 (proposing to include as section 7A(b) to the Sherman Act that "[a] foreign state engaged in conduct in violation of [this Act] shall not be immune under the doctrine of sovereign immunity from the jurisdiction or judgments of the courts of the United States in any action brought to enforce this section.>").

308. See *id.* (proposing to include as section 7A(c) to the Sherman Act that "[n]o court of the United States shall decline, based on the act of state doctrine, to make a determination on the merits in an action brought under this section.>").

309. *But see* S. 665, 107th Cong. (2001) (reporting that no congressional committee has suggested any amendments to NOPEC).

310. See, e.g., *supra* note 302 (maintaining that jurisdictional barriers, such as the act of state doctrine and sovereign immunity, will be overcome by the passage of NOPEC).

311. See *supra* Parts II.C, III (outlining the hindrances that must be surmounted in order to assert extraterritorial jurisdiction over OPEC).

312. See discussion *supra* Part IV.A (discussing precedent that currently bars a suit against OPEC within U.S. borders).

enacted.³¹³ In addition, OPEC's conspiracy to restrain trade is having a tremendous effect on the United States.³¹⁴

The U.S. government has authority to remove the legal barriers protecting OPEC.³¹⁵ Unlike the act of state doctrine, U.S. antitrust law³¹⁶ and the commercial activities exception to sovereign immunity³¹⁷ are applicable to actions against OPEC.³¹⁸ Enacting the aforementioned legislation, therefore, will facilitate invalidating these jurisprudential obstacles to holding OPEC accountable.³¹⁹ A cost-benefit analysis including scrutinizing service of process of OPEC,³²⁰ and the consequences of asserting jurisdiction over OPEC³²¹ proves this point.

First, if OPEC could be subject to suit in the United States, results, in the form of the alleviation of production quotas and price decreases, may not be seen immediately.³²² Service of process on OPEC and its member countries would also be a rather daunting task.³²³ Section 1608 of the FSIA³²⁴ provides authority for service on foreign states.³²⁵ Service on OPEC, however, would prove a rather

313. See *supra* Part IV.E.1-4 (describing current legislation whose passage would facilitate a lawsuit against OPEC).

314. See, e.g., Daniel T. Murphy, *Moderating Antitrust Subject Matter Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)*, 54 U. CIN. L. REV. 779, 789 (1986) (noting that OPEC's actions affect the price of petroleum products sold in the United States); Gary D. Allison, *Energy Sectionalism: Economic Origins and Legal Responses*, 38 SEV. L.J., 703, 712 (1984) (explaining that OPEC's activities have caused oil price and energy supply increases in the United States).

315. See *supra* Parts II.D, IV.B, .C, .D, .E.1-4 (postulating that with the combination of the disposal of comity analysis, a reinterpretation of the *IAM v. OPEC* decision, and the passage of new legislation such as NOPEC, OPEC can be subject to suit in the United States).

316. See *supra* Parts II.C.1-2, IV (explaining why U.S. antitrust law should be employed extraterritorially).

317. See *supra* Parts III.A.1-2, IV.B (explaining that a foreign state can be subject to suit in the United States if that foreign state engages in a commercial activity, one in which a private person can engage).

318. See *supra* Parts III.B, IV.C (comparing the differences in law existing when OPEC was last subject to suit and the current state of law to demonstrate why courts today should bar application of the act of state doctrine).

319. See, e.g., *supra* note 302 and accompanying text (explaining that NOPEC will destroy jurisprudential barriers preventing jurisdiction over OPEC).

320. See *infra* notes 322-29 and accompanying text (analyzing service of process on OPEC).

321. See *infra* notes 322-25 and accompanying text (discussing the effect of asserting jurisdiction over OPEC).

322. See *infra* text accompanying notes 323-29 (providing the procedural hindrances, which may delay effectuating suit against OPEC).

323. See *infra* notes 326-29 and accompanying text (discussing why service of process on OPEC is difficult).

324. 28 U.S.C. § 1608 (1994 & Supp. IV 1998).

325. See *id.* (providing the law on service, time to answer, and default in cases against foreign entities in U.S. courts). Section 1608 enumerates the general requirements for effectuating services on foreign states or their agents and

tedious procedure,³²⁶ because it would include effectuating service on eleven countries as well as the organization itself.³²⁷ Moreover, these foreign states, or the agents and instrumentalities associated therewith, who will in turn be served, may protest the entire proceeding,³²⁸ thereby generating a strain on U.S. foreign relations with those states.³²⁹

Second, there will be consequences to asserting jurisdiction over OPEC. If suit is in fact brought against OPEC, and, assuming *arguendo*, a judgment did not favor OPEC, it can be argued that more harm than good would ensue. The United States would be placing itself at a diplomatic disadvantage with respect to OPEC and its member nations,³³⁰ hence the act of state doctrine.³³¹ Adjudicating such a dispute may risk damaging international repercussions with OPEC and its member-nations.³³²

These concerns, however, are merely speculative and present a worst-case scenario. On a more positive note, a suit against OPEC would mandate that OPEC return to its normal operations, which ceased almost two years ago, and hopefully result in more oil

instrumentalities: "Service in the courts of the United States . . . shall be made upon a foreign state or political subdivision of a foreign state . . ." *Id.* at § 1608(a). "Service on the courts of the United States . . . shall be made upon an agency or instrumentality of a foreign state . . ." *Id.* at § 1608(b).

326. See generally DELLAPENNA, *supra* note 262, at 113-23 (discussing the various methods by which foreign states and their agents and instrumentalities can be served, as well as the discretionary nature accompanying such service). Coupled with the length of service of process, prolonged litigation may run counter to the goals of the entity seeking to bring suit against OPEC. See Lionel Kestenbaum, *Antitrust's "Extraterritorial" Jurisdiction: A Progress Report on the Balancing of Interests Test*, 18 STAN. J. INT'L L. 311, 342 (1982) (discussing the interests that must be weighed when asserting extraterritorial antitrust jurisdiction over a foreign entity).

327. See *supra* note 325 (providing 28 U.S.C. § 1608 as the relevant statute to effectuate service of process on foreign states and their agents or instrumentalities).

328. See DELLAPENNA, *supra* note 262, at 117-18 (postulating that a foreign state may refuse to accept service as a protest against the proceeding or the service, and that this type of protest occurs especially in politically sensitive cases).

329. See generally *id.* at 113-19 (discussing preferred methods of service on foreign states and the effects of such service).

330. But see *supra* text accompanying note 287 (suggesting that the abolition of the act of state doctrine would not harm the United States' foreign relations).

331. See *Int'l Ass'n of Machinists & Aerospace Workers v. Org. Petroleum Exporting Countries*, 649 F.2d 1354, 1358 (9th Cir. 1981) (discussing the long-term effect of bringing suit against a foreign state, and thereby disregarding the act of state doctrine).

332. See, e.g., Meal & Trachtman, *supra* note 244, at 652 (explaining that adjudicating anticompetitive conduct by OPEC may result in greater harm to American consumers if OPEC retaliated, and that adjudication would only remedy an isolated harm at the expense of possible greater harm); ATWOOD & BREWSTER, *supra* note 133, §2.17-18 (evaluating American anticartel policy and its negative effects on American business abroad and domestically); Kintner & Griffin, *supra* note 95, at 219-27 (discussing the concerns and controversy behind the extraterritorial application of the Sherman Act).

production and lower oil costs.³³³ This Comment suggests that antitrust law can be used to force OPEC to change its policy in a way that would allow OPEC to continue its profit making activities, but without unreasonable monetary exploitation of the countries it serves.

CONCLUSION

Oil prices today are higher than any time since the Iraqi invasion of Kuwait.³³⁴ OPEC's cut in oil production in early 1999 coupled with its augmentation in prices is now beginning to stunt U.S. economic growth.³³⁵ Americans are spending significantly more of their income on gasoline and other oil-related products than they were less than two years ago.³³⁶

It is time for the United States to make a concerted effort to combat this now seemingly curable problem. The availability of antitrust sanctions along with the disallowance of claiming the defenses of sovereign immunity³³⁷ and the act of state doctrine,³³⁸ would permit U.S. courts to assert jurisdiction over OPEC, thereby granting the means of potentially diminishing OPEC's control over the global oil market.³³⁹ OPEC is engaging in a commercial activity, and is in patent violation of the Sherman Act for engaging in a conspiracy to restrain trade.³⁴⁰ U.S. courts have an affirmative duty to combat antitrust violations that materially affect U.S. commerce and have a duty to protect U.S. citizens.³⁴¹ U.S. courts should perform the duties of their offices and take action against OPEC.³⁴²

This Comment urges U.S. courts to rethink their prior rulings and

333. See *supra* text accompanying notes 11-14, 56-57 (stating when and why OPEC began its current cutback in oil production).

334. See *supra* note 54 (discussing the Middle East crises that have had an effect on oil prices).

335. See Allison, *supra* note 314, at 712 (evaluating the effects of OPEC's price-fixing and production cutbacks on the U.S. economy, including oil price increases and the market value of domestic energy supplies rising above competitive levels).

336. See *supra* text accompanying notes 11-14 (discussing OPEC's recent actions and the effect it has taken on oil related products in the United States).

337. See *supra* Parts III.A, IV.B (outlining the requirements for retaining sovereign immunity and why OPEC's actions are in violation of those requirements).

338. See *supra* Parts III.B, IV.C (explaining the doctrine of the act of state and why OPEC's actions do not qualify for act of state protection).

339. See *supra* Part I.B (explaining OPEC's impact and domination of the global oil industry).

340. See *supra* note 70 (citing language from the Sherman Act that prohibits restraints on free competition between commercial entities).

341. See Chung, *supra* note 152, at 412 (explaining the importance of antitrust enforcement, whether it be enforcement on a domestic or an international scale).

342. See discussion *supra* pp. 1-2 (noting that OPEC's current decrease in oil production and increase in oil prices are helping directly to cause increases in gasoline prices in the United States).

Congress to adopt the aforementioned legislation, most specifically NOPEC, in their present form. This would allow a lawsuit to be brought against OPEC. The current criteria by which a suit against OPEC would be judged are indeed limited. Enacting new laws and restructuring old ones would not only permit a suit against OPEC but may begin a trend whereby other nations may follow suit and amend their corresponding laws. The laws of the United States are intended to protect Americans, not international cartels.