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SUBJECT: **Title I, "'No Oil Producing and Exporting Cartels Act of 2008'" or 'NOPEC'" of H.R. 6074 ("Gas Price Relief for Consumers Act of 2008")**

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Increasing concern over rising gasoline prices has led to a myriad of congressional suggestions for ways to approach the issue. This memorandum will address one of them — embodied in Title I of H.R. 6074, "Gas Price Relief for Consumers Act." Title I, styled, "'No Oil Producing and Exporting Cartels Act of 2008'" or 'NOPEC,'" would create an antitrust violation on the part of foreign states, or their instrumentalities or agents, who "act collectively ... with any other foreign state" or other entity to limit petroleum production, "set or maintain the price of oil ...," or take any other action in restraint of trade in that market.[1] Only suits by "the Attorney General of the United States" are authorized.[2] The measure passed the House, under suspension, on May 20, 2008, and is currently pending on the Senate legislative calendar under general orders (the Senate equivalent of "suspension" in the House).[3]

The legislation would, in addition to creating the antitrust violation, mandate that the Foreign Sovereign Immunities Act (FSIA)[4] would not immunize a foreign state "from the jurisdiction or judgments of the courts of the United States" in any action charging such a violation; and clarify that it was not incumbent upon U. S. courts to invoke the act of state

[1] Section 102 would add a new section 7A to the Sherman Antitrust Act (15 U.S.C. §§ 1-7).

[2] Section 102(d).

[3] Bills virtually identical to Title I of H.R. 6074 — H.R. 2264 and S. 879 — are also pending in the Senate, the former reported by the Senate Judiciary Committee on May 22, 2008, the latter already placed on the Senate legislative calendar under general orders. Although the references in this memorandum are to Title I of H.R. 6074, the discussion is applicable as well to the other legislation.

[4] 28 U.S.C. §§ 1602-1611.

doctrine as a ground for declining "to make a determination on the merits" in an action alleging such violation.[5]

Both the legal and economic considerations presented by Title I and similar measures will be presented and discussed in the remainder of this memorandum.

Background

"NOPEC" legislation is, in addition to being a response to rising gasoline prices, the congressional answer to the 1979 dismissal, on various grounds, of the antitrust suit brought by the International Association of Machinists (IAM) against the Organization of Petroleum Exporting States (OPEC).[6] In that case, which sought to make both OPEC *and* its member states liable for violation of U.S. antitrust laws, the United States District Court for Central California found, *inter alia*, that neither the OPEC *states* nor OPEC itself could be sued: "[t]he United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources":

> The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples.
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> It is difficult or impossible to separate the OPEC governments as governments from their role as oil producers. They began their price fixing role by levying taxes on foreign companies operating within their borders. The oil revenues are the great bulk of governmental revenues. Indeed for the OPEC nations supplying most of the oil, the oil revenues are the great bulk of the whole national product.[7]

No action could be brought against OPEC, the organization, because, for two reasons, service of process could not be had. First, because OPEC is not a country, it could not be legally served under the Foreign Sovereign Immunities Act, in which Congress specifically found that

> the determination by United States courts of the *claims of foreign states to immunity* from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.[8]

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[5] The "act of state" doctrine, is not statutory nor a requirement of international law, but is firmly embedded in international relations. It is a judicially created doctrine "created to effectuate general notion of comity among nations ...." (First Nat.City Bank v. Banco Nacional de Cuba, 606 U.S. 759 (1972)). Its invocation by U.S. courts is "grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government." *Id.* at 767-768. *See generally*, Banco Nacional de Cuba v.Sabbatino, 376 U.S. 398 (1964).

[6] International Association of Machinists and Aerospace Workers (IAM) v. The Organization of the Petroleum Exporting Countries (OPEC), 477 F.Supp. 553 (D.C. Cal. 1979), *aff'd.*, 649 F.2d 1354, *cert. denied*, 454 U.S. 1163 (1982).

[7] 477 F.Supp. at 560, 567, 568.

[8] 28 U.S.C. § 1602 (emphasis added).

Second, service could not be had under the International Organizations Immunities Act[9] because that act is applicable only to "public international organizations in which the United States participates"[10] and the United States does not participate in OPEC.

The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court dismissal:

> While the case is formulated as an anti-trust action, the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources. On the other hand, should the court hold that OPEC's actions are [antitrust] legal this "would greatly strengthen the bargaining hand" of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions.[11]

We note here that the district court in *Machinists*[12] buttressed its ruling concerning the non-amenability of foreign states to the jurisdiction of U.S. courts — the applicability of the act of state doctrine — on the on the 1943 Supreme Court, antitrust "state action"[13] opinion in *Parker v. Brown.*[14] As that court interpreted *Parker*, the actions of sovereigns in determining the proper allocation of their natural resources are not assailable under the antitrust laws.

> We need not look beyond our own borders for examples of a government taking a determinative role in the marketing of its wealth and natural resources. Parker ... involved an antitrust challenge to a California state program which controlled the marketing of raisins grown in the state, so as to restrict competition among the growers, and maintain prices. ... The Court, in reversing the grant of injunctive relief to plaintiff, held that the program was "an act of government," [417 U.S.] at 352, ... and reasoned:
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>> (I)t is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command. [417 U.S.] at 350 ....[15]

Parker dealt, however, with the antitrust status of U.S., not foreign states. Further, the Supreme Court, in a later series of "state action" decisions, clarified that the reason for granting "state action" immunity to the states as states was this nation's commitment to federalism, rather than a "stand-alone" notion of state sovereignty.[16]

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[9] 22 U.S.C. §§ 288 *et seq.*

[10] 22 U.S.C. § 288.

[11] IAM v. OPEC, 649 F.2d at 1361.

[12] *See* note 6, *supra*.

[13] The "state action" doctrine in U.S. antitrust law stands for the proposition that the federal antitrust laws are not applicable to the states, and therefore, to activities undertaken by the states or their agents.

[14] 317 U.S. 341 (1943).

[15] 477 F.Supp. at 368.

[16] *E.g.*, Fisher v. City of Berkeley, Cal., 475 U.S. 260, 279 (1986) : "The Parker state-action exemption reflects Congress' intention to embody in the Sherman Act the *federalism principle* that the States possess a significant measure of sovereignty *under our Constitution*. ... Ours is a ' dual system of government,'" *Parker*, 317 U.S. at 351 ...." (emphasis added).

Legal Considerations

Title I would create a new section of the Sherman Antitrust Act[17] specifically to render certain actions by a foreign state or states and any other entity violative of that act; it is at least arguable that such an amendment is unnecessary as redundant. If one agrees with the proposition that the targeted foreign states engage in a commercial activity when they take measures that affect the price of petroleum in this country, they would seem to be currently liable for violations of the antitrust law in a suit by the United States.

Actions taken abroad by, *e.g.*, a *non-sovereign* that have the requisite effect on U.S. commerce are already reachable under the U.S. antitrust laws, even absent specific statutory authorization. As stated by the United States Court of Appeals for the Second Circuit in 1945:

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. American Banana Co. v. United Fruit Co., 213 U.S. 347, 357, ... *On the other hand*, it is *settled law* ... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.[18]

Actions taken by *sovereign nations* in the course of commercial conduct in the United States or having an effect on U.S. commerce are reachable because the Foreign Sovereign Immunities Act already contains a commercial activity exception to the general rule that a foreign state is protected from the jurisdiction of U.S. courts.[19] There is *no sovereign immunity*, according to existing statute (28 U.S.C.A. § 1605(a)(2)), in circumstances

> in which the [judicial] 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; ....*[20]

Assuming, then, that the drafters of H.R. 6074 intended to characterize OPEC and its supporting nations as participants in or entities that affect commercial activity in the United States (and that a court agreed with that characterization), the antitrust violation the bill would create, is likely not necessary.

There is, however, an additional consideration. If reliance on *Parker is* justified, the Court's subsequent "state action" rulings create a kind of "safe haven" for private entities acting pursuant either to a state's explicit order to do a particular thing,[21] or state

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[17] 15 U.S.C. §§ 1-7.

[18] U.S. v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) (some citations omitted; emphasis added). The appeals court decided the case after receiving it on transfer from the Supreme Court because the Court did not have the necessary quorum to issue an opinion.

[19] 28 U.S.C. § 1605(a)(2).

[20] Emphasis added.

[21] *E.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

authorization of the action taken *if* the state "actively supervises that action.[22]

Neither would there appear to be a necessity for the amendments to the Foreign Sovereign Immunities Act that would be made by Section 103 of H.R. 6074;[23] section 103 is designed to reinforce the statement in section 102(b) that "[a] foreign state engaged in conduct in violation of [the antitrust prohibition set out earlier] 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."

On the other hand, the Supreme Court treatment of the definition of "persons" in the antitrust laws may provide instruction concerning the amenability of foreign states to suit in U.S. courts. Section 1 of the Sherman Act prohibits contracts or conspiracies in restraint of trade by any "person,"[24] and section 7[25] defines "persons" as including corporations or associations, but does not specifically exclude "foreign states" from the definition. While it is true that the Court has had occasion to speak to that issue only in the context of suits *by* foreign nationals for antitrust damages,[26] it is noteworthy that it did not draw any distinction between the meaning of "persons" for purposes of plaintiffs seeking antitrust damages, and the meaning of "persons" for purposes of foreign governments as defendants in antitrust suits.[27]

Any suit against either a private entity or foreign state must still, of course, adhere to the requirements of "long-arm" jurisdiction, including the fact of impact on U.S. commerce.

Section 102(c) of H.R. 6074 would clarify 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." First, as note 5, *supra*, indicates, the act of state doctrine is a judicially created doctrine, although its application *may* be overridden by statute.[28] Second, assuming that a suit were brought against foreign nations that act "collectively or in combination with other foreign states [or other entities], whether by cartel of any other association or form of cooperation or joint action," it is likely that a court would simply couch its opinion in non-act of state terms to reach whatever conclusion it deemed advisable

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[22] *E.g.*, California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

[23] We assume that the section was drafted prior to the January 2008 enactment of P.L. 110-181 ("National Defense Authorization Act for Fiscal Year 2008"), which deleted 28 U.S.C. § 1605(a)(7), and placed a period at the end of § 1605(a)(6). In view of the existing language of § 1605(a), we believe that section 103 of H.R. 6074 (introduced in May 2008) would strike the period after § 1605(a)(6) and insert a semicolon, insert "or" after the semicolon, eliminate the reference to § 1605(a)(7), and add a new paragraph (7) (as opposed to the (8) that the measure currently dictates).

[24] 15 U.S.C. § 1.

[25] 15 U.S.C. § 7.

[26] *See, e.g.*, Pfizer v. Government of India, 550 F.2d 396 (8th Cir. 1976), *aff'd*, 434 U.S. 308 (1978), *reh. denied,* 435 U.S. 910 (1978).

[27] *E.g.,* "[T]his Court has expressly noted that the use of the word 'person' in the Sherman and Clayton Acts did not create a "hard and fast rule of exclusion" of governmental bodies" (434 U.S. at 316).

[28] *E.g.*, 22 U.S.C. § 2370(e)(2), restricting act of state doctrine in cases concerning expropriation of property by a foreign sovereign.

or unavoidable.

Economic Considerations

Since its formation in Baghdad in 1960, OPEC has been identified as an oil cartel. In economic theory, the purpose of a cartel is to coordinate the member's actions to create more profitable market conditions than each member could expect under a more competitive environment. In the case of OPEC, for much of its recent history, it has sought to assign members production quotas, designed to limit the amount of crude oil entering the market and, as a result, supporting an oil price that is above the competitive market price.

Economists point out that a successful cartel may create conditions that tend to break it apart. The logic is that if the cartel is successful in raising prices above the competitive level, and if one, or more, members have excess production capacity, they will have an incentive to cheat on their quota and over-supply the market, taking advantage of the escalated price. If each member sends extra production to the market, the price will tend to fall, negating the cartel's goal of raising prices. As cartel members take actions that are individually beneficial, they create conditions that damage not only the group as a whole, but ultimately their own interests.

Over the years, OPEC has experienced members that cheat on their quotas. The group has responded in a variety of ways, from ignoring their actions to the most important member, Saudi Arabia, flooding the market with oil to try to enforce cooperation.

Current Market Environment

The escalated prices for crude oil the market has experienced since 2004 appear to be different from earlier periods of high oil prices. High oil prices in 1973-1974, and 1979-1980 were thought to arise from supply restrictions. The more recent price increases are thought to result from demand increases. If this viewpoint is correct, OPEC has not had to take any direct action to increase prices; consumers have done it for them. OPEC average production rates were 31.88 million barrels per day (mb/d) in 2003, rising to 34.45 mb/d in 2004, and 35.41 mb/d in 2007.[29] These production figures represent an increase in production of over 3.5 mb/d during the period of increasing prices. It is also generally accepted that excess capacity in the oil market is less than 2 mb/d, and at times since 2004, has been as low as 1 mb/d. This excess capacity is largely held by one country: Saudi Arabia. In June 2008, as the market speculated that Saudi Arabia might announce an increase in oil production of between 200,000 and 500,000 b/d, oil prices remained at over $130 per barrel, suggesting that extra production of this magnitude will do little to lower prices in the face of strong demand.[30]

In the long term, it is unlikely that oil prices will fall unless large amounts of new supply enter the market. National oil companies, including those that represent OPEC nations, have been criticized for not investing adequately in oil capacity expansion to meet

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[29] Energy Information Administration, OPEC production data, available at http://www.eia.doe.gov/emeu/ipsr/t21.xls.

[30] Oil Daily, vol. 58, no. 115, June 16, 2008, p.3.

future demand.[31] At the direction of their governments, they have used oil revenues to subsidize domestic consumption of petroleum products, provide funding for social programs, and a wide variety of other governmental activities. However, many other nations, including those that are not OPEC members, have also chosen not to maximize the exploration and development of oil resources in their own territory and offshore areas.

Although it is likely that the OPEC quota system has had a role in determining the international price of oil in the past, it is also likely that its role in the price increases since 2004 has lessened. The underlying causes for high oil prices, including high demand, mis-matches between the quality of oil on the market and existing refinery capacity, use of oil as a hedge against both inflation and the declining dollar, and possibly speculation on oil futures market, will remain in place, independent of OPEC action.

[31] CRS Report RL34147, *The Role of National Oil Companies in the International Oil Market,* August 21, 2007.