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INTRODUCTION

"Coordination and unification of policy"; "Stabilization of the markets"; "Ensuring an efficient and regular market supply"; "Fair returns for investors in industry."[1] These admirable goals of the Organization of Petroleum Exporting Countries (OPEC) seem equally likely to appear within the various mission statements of governmental agencies such as the U.S. Department of Justice Antitrust Division, the Federal Trade Commission, or the EU Commission on Competition Law. However, they encapsulate the purported mission statement of an organization that is unquestionably illegal under both EU and U.S. law, an organization that commentators and experts have called "arsonists" of the global economy[2] and "snake-oil salesmen."[3]

In September of 1960, OPEC was founded in Baghdad by five signatory nations: Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela.[4] Although OPEC currently has 12 Member Nations, membership has fluctuated over the years and has included countries such as Qatar, Indonesia, Libya, United Arab Emirates, Algeria, Nigeria, Ecuador, Angola, and Gabon, many of which have maintained continuous membership, while others have suspended their membership for periods of time depending upon internal political circumstances.[5]

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1. *Our Mission*, ORG. OF THE PETROLEUM EXPORTING COUNTRIES [hereinafter OPEC], http://www.opec.org/opec_web/en/about_us/23.htm [http://perma.cc/EF8Z-QE3K] (archived Feb. 16, 2014).

2. Gal Luft, *How to Ruin OPEC's Birthday*, FOREIGN POLICY (Sept. 9, 2010), http://www.foreignpolicy.com/articles/2010/09/09/how_to_ruin_opecs_birthday [http://perma.cc/65YV-XTAV] (archived May 13, 2014.)

3. Jerry Taylor, *Left, Right and Wrong on Energy,* WASH. POST, Aug. 14, 2000, at A21.

4. OPEC, *OPEC Statute 2012*, at 1 (2012), *available at* http://www.opec org/opec_web/static_files_project/mediadownloads/publications/OPEC_Statute.pdf [http://perma.cc/V5HD-CQFH] (archived Mar. 15, 2014).

5. *Opec*: *The oil cartel in profile,* BBC NEWS (May 29, 2008, 10:39 AM), http://news.bbc.co.uk/2/hi/business/3768971.stm [http://perma.cc/L844-HNUL] (archived Feb. 16, 2014).

The OPEC Statute differentiates between the original five signatory countries, known as "Founder Members," and countries that joined after the formation, which are known as "Full Members."[6] The Statute allows new countries to join OPEC as Full Members if accepted by a majority of three-fourths of Full Members, including the concurring votes of all five Founding Members.[7] The Statute stipulates that "any country with a substantial net export of crude petroleum, which has fundamentally similar interests to those of Member Nations, may become a Full Member of the Organization," provided that the voting requirements are met.[8] Member Nations refer to OPEC as an "intergovernmental organization" with the goal of protecting the interests of the producing nations.[9]

However, in an oligopolistic market such as the oil market, where the number of producers is limited and the actions of any one producer may affect the entire market; OPEC's efforts to protect the interests of its Member Nations offer a glimpse of its true nature. The organization's ongoing agreement to regulate production in order to control international oil markets and its stated purpose of stabilizing both prices and supply for the financial gain of its members bring to light that OPEC is nothing more than a cartel on a macro-level. Because the organization's sole operations seem to consist of manipulating markets, restricting output, and fixing prices, the categorization of OPEC as a cartel has never been seriously questioned. Although its methods are unquestionably illegal, both U.S. and EU competition authorities have historically avoided measures that would be taken as a matter of course in the face of similar domestic, foreign corporate, or EU Member State violations.[10]

In Part I, this Article will examine antitrust violations by OPEC under both U.S. and EU competition regimes. Then, in Part II, the Article will proceed to analyze some of the problems with asserting antitrust jurisdiction over OPEC in its role as a "sovereign state" and the differing paths taken by U.S. and EU authorities in dealing with OPEC, while viewing the organization as a necessary evil. Finally, recent advances in technology that have triggered an "oil boom" in North America will be examined in light of their effect on oil

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6. OPEC, *supra* note 4, at 3.
7. *See id.*
8. *See id.*
9. OPEC, *supra* note 4, at 1.
10. *See Solutions to Competitive Problems in the Oil Industry: Hearing Before the H.R. Comm. on the Judiciary*, 106th Cong. 34–39 (2000) [hereinafter *Solutions*] (statement of Richard G. Parker, Director, Federal Trade Commission Bureau of Competition).

imports in Part III, and the Article will discuss how these advances may affect OPEC's ability to manipulate the global oil market.

I. CLASSIFICATION OF OPEC AS A CARTEL UNDER U.S. AND EU COMPETITION LAW

The classification of a "cartel," as it is commonly used, refers to a formal organization of normally competing producers or manufacturers that formally or explicitly agree to engage in anticompetitive behaviors, such as fixing prices, limiting output, division of profits, or allocation of market share, customers, or territories.[11] Whereas the underlying goal of competition authorities on a global scale is preservation of competitive forces within free and uninhibited markets, the behavior of cartels are distinguishable from lawfully competitive behavior among businesses. While antitrust law does not condemn businesses gaining market dominance through "superior skill, foresight and industry,"[12] authorities rigorously seek to proscribe formal agreements that result in collusive outcomes affecting both allocation of market production and pricing inequity. Since participating members rely on an agreed course of action, these agreements typically have the effect of eliminating competition within a specific market, which in turn reduces incentives to provide innovative products or services at competitive prices. This results in a stagnating market, with consumers ultimately paying higher prices for lower quality goods.[13]

In an oligopolistic market, these results are often more pronounced, frequently resulting in what is commonly known as a "captive market."[14] Captive markets are characterized by potential consumers being forced to choose from a limited number of competitive suppliers, offering goods of a quality and price completely predetermined by the suppliers and wholly unaffected by competitive forces. Captive markets result in higher prices and less diversity for consumers, ultimately creating a "Hobson's choice" for the consumer, with their only choices being to purchase what is available or to make no purchase at all.[15] Notably, the factors that

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11. JOHN DUFFY, ECONOMICS 136 (Jerry Bobrow ed., 1st ed. 1993).

12. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945).

13. *See* MARKET IMPERFECTIONS AND MACROECONOMIC DYNAMICS 187–90 (Jean-Olivier Hairault & Hubert Kempf eds., 2002).

14. DREW FUNDENBERG & JEAN TIROLE, DYNAMIC MODELS OF OLIGOPOLY: FUNDAMENTALS OF PURE AND APPLIED ECONOMICS 25 (Routledge ed., 2002).

15. *See* Charles Johnson, *The Many Monopolies*, FOUND. FOR ECON. EDUC., (Aug. 24, 2011), http://www.fee.org/the_freeman/detail/the-many-monopolies [http://perma.cc/FE9E-WDKE] (archived Mar. 15, 2014).

give rise to an oligopolistic market are also conducive to the formation of cartels. Specifically, the hallmark of an oligopolistic market is a marketplace in which consumers are forced to deal with relatively few suppliers with dominant market share, high barriers to entry into the market by competitors, and relatively interchangeable products.[16] Because cartels normally occur in an oligopolistic market, authorities are able to easily identify companies holding a dominant market share. However, it is usually difficult to prove that competitor behavior is the result of a formalized agreement, rather than the "success of a business which reflects only a superior product, a well-run business, or luck."[17] Since anticompetitive arrangements are illegal in most countries, and businesses involved in such arrangements are often subject to immense punitive fines, market allocation or price-fixing operations are typically well concealed, and the details are often never fully revealed, even after discovery and litigation.[18] For this reason, when cartels are uncovered and proven, they are prosecuted vigorously, with well-publicized punishment, fines, and penalties intended to deter other anti-competitive agreements.[19]

Since corporations and other business entities (known as "private" cartels) rely on the sufferance of national and international governments for their existence, they are subject to jurisdiction with relative ease by a "host" country enforcing an anti-competitive regime.[20] However, the very nature of OPEC poses unique jurisdictional challenges for competition authorities. Shielded by its status as an "intergovernmental" organization and the sovereign status of its Member Nations, OPEC openly engages in anti-competitive behaviors that would be considered illegal under almost any legal regime that encourages free market competition.[21] These behaviors obviate the need for authorities to look for collusive markers or patterns that would normally suggest or reveal the presence of a clandestine cartel. For example, it is the organization's stated goal to unify petroleum policies of its members to ensure stability of pricing and protect the interest of its members by

16. DUFFY, *supra* note 11, at 136.

17. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 (1985) (internal quotation marks omitted).

18. *See* CHARLES J. GOETZ & FRED S. MCCHESNEY, ANTITRUST LAW: INTERPRETATION AND IMPLEMENTATION 98 (4th ed. 2009).

19. *See, e.g.*, Caroline Binham, *Libor probes push cartel penalties to record €3bn*, FINANCIAL TIMES, Jan. 8, 2014, at 17.

20. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW: OXFORD MONOGRAPHS IN INTERNATIONAL LAW 39 (2008).

21. *See Solutions*, *supra* note 10, at 38.

limiting output in order to maintain their collective market power.[22] OPEC imposes quota restrictions and production cuts on its members, ensuring a balance between supply and demand in the industry, and it manipulates pricing through use of a "price band mechanism" where fluctuations in price-per-barrel outside of a certain range will trigger new quota agreements.[23]

OPEC frequently reduces production in order to drive up prices and relies on its status as a "public," or government-sanctioned, cartel to shield it from legal action by other nations. Despite government tolerance of public cartels (e.g. labor unions—and, during times of economic crisis such as during the Great Depression, so-called "crisis cartels"),[24] there is no evidence that public cartels are less harmful to the public welfare than private cartels. Further, because public cartels are governmentally sanctioned or enforced, they have the potential to be more effective and, therefore, more harmful.[25] However, since the inception of OPEC, American and European competition authorities have regarded it with measured distrust, and despite strong anticompetitive prohibitions in both the United States and EU, the tremendous reliance on foreign oil on the part of both governments has had the effect of tying their hands.

The United States has a long history of enforcement against cartels, the elimination of which helped form early U.S. competition law, when cartels were more commonly known as "trusts."[26] The Sherman Antitrust Act of 1890 outlawed "every contract,

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22. Edmund M. Daukoru, President, OPEC Conference, Oil Market Stability: The Role of OPEC (Sept. 8, 2006), *available at* http://www.opec.org/opec_web /en/994.htm [http://perma.cc/7KYA-JACB] (archived Mar. 15, 2014).

23. Arturo Silva Calderon, Secretary General, Speech to the European Energy Foundation, The Role of OPEC in the 21st Century, Speech to the European Energy Foundation, (July 9, 2003), http://www.opec.org/opec_web en/918.htm [http://perma.cc/DC5Y-42VT] (archived May 12, 2014).

24. *See* Organisation for Economic Co-operation and Development [hereinafter OECD], *Crisis Cartels*, OECD Doc. No. DAF/COMP/GF/WD(2011)20, 2 (Jan. 27, 2011), *available at* http://ec.europa.eu competition/international/multilateral 2011_feb_crisis_cartels.pdf [http://perma.cc/AQ23-28VP] (archived Mar. 15, 2014) (submission from the European Union for the Global Forum on Competition, Feb. 17–18, 2011).

25. *See* William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the TokyoAmerica Center: The Role of Competition in Promoting Dynamic Markets and Economic Growth (Nov. 12, 2002), *available at* http://www.justice.gov/atr/public/speeches/200484.htm [http: /perma.cc/W59A-GTJZ] (archived Mar. 15, 2014).

26. *See* Rudolph J.R. Peritz, *The Sherman Anti-Trust Act of 1890*, *in* HISTORIANS ON AMERICA 30, 33, http://photos.state.gov/libraries/korea/49271 dwoa122709/Historians-on-America.pdf [http://perma.cc/V37-U6JY] (archived Mar. 15, 2014).

combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," which includes cartel violations such as price fixing, limitations on output, and customer or territory allocation.[27] The Federal Trade Commission plays a major role in regulating competition by enforcing provisions of the antitrust laws that prevent anticompetitive collusive activities, as well as the subsequent acquisition or abuse of market power.[28] Although violations involving agreements between corporate competitors are punishable as federal crimes in the United States,[29] there is no overarching international prohibition against cartels that exerts pressure on an intergovernmental organization such as OPEC. By any measure under U.S. antitrust law, OPEC is a cartel—a "conspiracy in restraint of trade, under the Sherman Antitrust Act,"[30]—and the organization's impact on the U.S. economy has implications that have affected nearly every industry on a micro-level as well as every family that relies on an automobile for transportation.[31] OPEC's effect on the U.S. economy has been calamitous at times, beginning with the 1973 oil embargo in response to U.S. aid to Israel after the outbreak of hostilities between Israel and a coalition of Arab states led by Egypt and Syria.[32]

Frustrated by the depreciation of the U.S. dollar, the growing demand for oil by the United States while maintaining 2% per year pricing increases, and by paying 100% price increases to buy back refined petroleum products that they had sold as crude, the Arab members of OPEC proclaimed an oil embargo against the United States when the U.S. began arms shipments to Israel.[33] OPEC announced an overnight price increase of 70% and plans to immediately cut production by 5%, with further monthly cuts until

27. 15 U.S.C. § 1 (2012).
28. *Solutions*, *supra* note 10, at 35.
29. 15 U.S.C § 1.
30. *See* Andrew C. Udin, Comment, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC,* 50 AM. U. L. REV. 1321, 1324 (2001).
31. *See* Jim Snyder, *Fracking Seen Robbing OPEC of Gasoline Pricing Power*, BLOOMBERG (Dec. 10, 2012, 8:00 AM), http://www.bloomberg.com/news/2012-12-10/fracking-seen-robbing-opec-of-gasoline-pricing-power.html [http://perma.cc/8UEA-F73P] (archived Mar. 15, 2014).
32. *See* Mark Fischetti, *40 Years after OPEC Oil Embargo, U.S. May Finally Get Off Imported Crude*, SCI. AM. (Oct. 16, 2013), http://blogs.scientificamerican.com/observations/2013/10/16/40-years-after-opec-oil-embargo-u-s-may-finally-get-off-imported-crude/ [http://perma.cc/PW3K-4DL6] (archived Mar. 15, 2014).
33. *See id.*

their objectives were met.[34] These measures had the practical effect of slamming the brakes on the vulnerable U.S. economy and forcing concessions in the form of price increases and new trade negotiations.[35] With price controls by the government in place to keep prices artificially low, shortages were already a possibility in the face of growing U.S. consumption, but the embargo led to shortfalls that were both unexpected and unprecedented.[36] The subsequent "oil shock" led to a scarcity of gasoline across the nation, resulting in gas station closures, rationing lines that stretched for miles and lasted for hours, and alternate fuel days for consumers who could only buy fuel on days corresponding to whether their license plate ended with odd or even numbers.[37] Although the embargo is now viewed as only the triggering mechanism for a shortage due primarily to price controls, it remains the most visible and painful reminder of OPEC's first decision to use its leverage over the production of oil in a punitive way and at the same time stimulate real income for the producing Member Nations.

Under EU law, the Treaty on the Functioning of the European Union prohibits cartels and other agreements that could disrupt free competition in the EU's common market.[38] Article 101 of the Treaty prohibits cartels by declaring that they are incompatible with the common market and automatically voids "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."[39] The Article further specifies a prohibition against agreements that: (1) set the price at which goods, services, or commodities will be bought or sold, or the conditions under which buying or selling will occur; (2) set limits on the amount of goods produced or sold; (3) divide up a market between competitors; (4) place certain trading parties at a competitive disadvantage by applying different conditions to the

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34. MARK WESTON, PROPHETS AND PRINCES: SAUDI ARABIA FROM MUHAMMAD TO THE PRESENT, 217 (2008).

35. William. D. Smith, *Iranian Oil Price Quadruples*, N.Y. TIMES, Dec. 12, 1973, at 1, 64.

36. Fischetti, *supra* note 32.

37. Chris Isidore, *A return to gas lines and rationing? Current oil-price run churns up memories of gasoline rationing and long waits on gas lines*, CNN MONEY (Oct. 13, 2004, 1:56 PM), http://money.cnn.com/2004/10/12/news/economy/gas_lines/index.htm [http://perma.cc/Q65C-Q22J] (archived Feb. 16, 2014).

38. *See* Consolidated Version of the Treaty on the Functioning of the European Union tit. VII, ch. 1, § 1, art. 101, Oct. 26, 2012, 2012 O.J. (C 326) 47, 88 [hereinafter TFEU].

39. *Id.*

same type of transactions; or (5) make acceptance of contracts subject to the acceptance of supplementary obligations with no connection to the original contracts.[40] Although there are limited exceptions when agreements contribute to the improvement or distribution of goods or the promotion of technical or economic progress, cartels are generally illegal under EU competition law, and the European Commission typically imposes heavy fines on companies involved in a cartel.[41] Further, since the driving principle behind the European Union is the establishment of a centralized common market among all of the independent member states,[42] "public" cartels pose a unique risk of rendering EU competition law ineffective. In order to address this, "public" cartels that are sanctioned by Member States are specifically addressed in the treaty governing the functioning of the European Union.[43]

Another unique feature of EU competition law specifically addresses the secretive nature of cartels: the doctrine of "leniency," which encourages cartel members to provide evidence of the cartel's existence in exchange for a waiver of any future fines imposed.[44] With fines ranging into the hundreds of millions of Euros, the leniency policy is a strong incentive for cartel members to cooperate with the EU in revealing the existence of what is considered one of the "most serious violations of antitrust rules."[45] However, the open actions of OPEC negate the need for application of any method of discovering surreptitious agreements in the European Union, just as it negates this need in the United States. It is clear that OPEC is as much a cartel under EU law as it is under the U.S. legal regime.[46] However, in spite of vigorous prosecution of cartels on both a private and public level by the European Commission, the EU has joined the United States in its abstention from asserting competition law against OPEC's distortion of the world oil market.

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40. *Id.*
41. THE EUROPEAN UNION EXPLAINED: COMPETITION, EUROPEAN COMM'N 5 (2013), http://europa.eu/pol/pdf/flipbook/en/competition_en.pdf [http://perma.cc/3N4H-HW4F] (archived Mar. 15, 2014).
42. *The history of the European Union*, EUROPEAN UNION, http://Europa.eu/about-eu/eu-history/index_en.htm [http://perma.cc/D3KE-M3R6] (archived Mar. 15, 2014) (see 1980-1989, The changing face of Europe—the fall of the Berlin Wall).
43. *See* TFEU, *supra* note 38, art. 107.
44. *See* Press Release, European Union, Commission Adopts New Leniency Policy For Companies Which Give Information On Cartels (Feb. 13, 2002), *available at* http://europa.eu/rapid/press-release_IP-02-247_en.htm [http://perma.cc/U59Y-VRCK] (archived Feb. 16, 2014).
45. *Id.*
46. *See* TFEU, *supra* note 38, art. 101.

II. LIMITIATIONS ON THE APPLICATION OF U.S. AND EU COMPETITION LAW OVER OPEC

Both the United States and European Union have failed to seriously challenge OPEC for several fundamental reasons, the principle of which is an intrinsic reliance on the availability of affordable oil to drive their respective economies.[47] While this concept is elemental, it cannot be stressed enough in light of the fact that demand for oil is increasing even in the face of massive efforts to reduce reliance on this type of fuel.[48]

The United States relies on fossil fuels to provide approximately 80% of its energy, including nearly two-thirds of its electricity and virtually all of its transportation fuels.[49] Even with aggressive development and deployment of new renewable and nuclear technologies, it is likely that reliance on fossil fuels to power an expanding economy will actually increase, at least over the next two decades.[50] With a population recently exceeding 500 million citizens,[51] the European Union is also "heavily dependent" on oil, particularly for use in the transport sector and for domestic and industrial use in some Member States.[52] Although consumption has declined somewhat in the last few years, the European Union still ranks as one of the top consumers of oil in the world, with an estimated 12.7 million barrels per day consumed in 2012.[53]

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47. *See, e.g.*, William L. Watts, *House takes aim at OPEC*, WALL ST. J.: MARKET WATCH (Mar. 14, 2007, 5:28 PM), http://www.marketwatch.com/story/house-votes-to-strip-opecs-antitrust-immunity [http://perma.cc/U5FG-G6EN] (archived Mar. 15, 2014).

48. *See* Jorn Madslien, *Stability fears rise as oil reliance grows*, BBC NEWS (Oct. 26, 2004, 12:00 PM), http://news.bbc.co.uk/2/hi/business/3953907.stm [http://perma.cc/5859-UXT9] (archived Feb. 16, 2014).

49. *See Primary Energy Consumption by Source*, U.S. ENERGY INFO. ADMIN. (Feb. 2014), http://www.eia.doe.gov/emeu/mer/pdf/pages/sec1_7.pdf [http://perma.cc/LU4J-3QJB] (archived Mar. 15, 2014).

50. *See* Duncan Clark, *Why can't we quit fossil fuels?*, THE GUARDIAN (Apr. 17, 2013, 12:49 PM), http://www.theguardian.com/environment/2013/apr/17/why-cant-we-give-up-fossil-fuels [http://perma.cc/XCD3-SRH7] (archived Mar. 15, 2014).

51. Matej Hruska, *EU Population Tops 500 Million*, BLOOMBERG BUSINESSWEEK (July 29, 2010), http://www.businessweek.com/globalbiz/content/jul2010/gb20100729_623637.htm [http://perma.cc/X83J-FMAJ] (archived Mar. 15, 2014).

52. *Oil and its derivatives*, EUROPEAN COMMISSION, http://ec.europa.eu/competition/sectors/energy/oil/oil_en.html [http://perma.cc/MDY8-FJNL] (archived Mar. 15, 2014).

53. BRITISH PETROLEUM, BP STATISTICAL REVIEW OF WORLD ENERGY, 11 (2013), http://www.bp.com/content/dam/bp/pdf/statistical-review/statistical_review_of _world_energy_2013.pdf [http://perma.cc/FC7A-TJ5G] (archived May 12, 2014).

In both cases, massive dependence on oil poses unique problems when addressing the application of U.S. or EU antitrust law against OPEC. With economies and industries driven by oil, OPEC has the power to bring both powers to their knees if it were to decide to initiate another embargo, which would cause oil prices to skyrocket.[54] In the case of the European Union, OPEC has also used the threat of limiting production if it discovered the European Union using its own emergency reserves of oil to make oil more affordable for its citizens.[55] At its summit in 2000, after the United States opened its strategic reserves to keep prices low, OPEC warned it would cut production to drive up prices; in doing so, OPEC was aiming to balance any reductions due to a similar EU utilization of its strategic reserves.[56]

Since then, the United States has maintained a tenuous relationship with OPEC. Despite the recent dramatic increase in shale oil production, the United States imported over 40% of the oil consumed in 2012, with 28% of those imports coming from producers in the Persian Gulf.[57] Although most U.S. imports were from the Western Hemisphere, 9% were from Venezuela and another 13% were from Saudi Arabia, both of whom are OPEC members.[58] In sum, approximately 28% of all the oil imported into the U.S. in 2012 was from Persian Gulf countries, such as Bahrain, Iraq, Kuwait, Qatar, Saudi Arabia, and United Arab Emirates, many of which are OPEC Member Nations.[59]

The United States' dependence on foreign oil has historically led to an enormous reliance on the goodwill of an organization that is *per se* illegal under U.S. antitrust law, but antitrust authorities are conspicuously quiet when it comes to confronting OPEC's market controls and manipulations. In the last few decades, there have been suggestions that the United States may have the means to assert subject-matter jurisdiction over OPEC and should move towards pursuing claims against the organization despite the dismissal of an

54. *See* Ken Blackwell, *Forty Years of OPEC Manipulation*, THE DAILY CALLER (Oct. 15, 2013, 11:14 AM), http://dailycaller.com/2013/10/15/forty-years-of-opec-manipulation/ [http://perma.cc/H7WR-TQWD] (archived Mar. 15, 2014).

55. *See OPEC warns Europe on oil*, BBC NEWS (Sept. 27, 2000, 7:31 PM), http://news.bbc.co.uk/2/hi/business/944785.stm [http://perma.cc/8ZHF-T75S] (archived Feb. 16, 2014).

56. *See id.*

57. *See How dependent are we on foreign oil?*, U.S. ENERGY INFO. ADMIN., http://www.eia.doe.gov/energy_in_brief/foreign_oil_dependence.cfm [http://perma.cc/Z7EW-VH9Y] (archived Feb. 16, 2014).

58. *See id.*

59. *See id.*

earlier attempt to assert jurisdiction in 1981.[60] There, the court held that OPEC was shielded from jurisdiction because it was acting in its governmental capacity when it regulated production.[61] However, in 1993, this earlier contention was cast into doubt by *Hartford Fire Insurance Co. v. California*, in which the Supreme Court ruled that the Sherman Act could be applied to the acts of foreign corporations committed in foreign countries "that were meant to produce and did in fact produce some substantial effect in the United States," which OPEC's actions consistently do.[62]

Increasing gasoline prices and higher prices for oil used by industry, such as airplane and jet fuel, have also led to legislative pressure from both the Senate and House. In April 2000, and again in April 2001, Senator Arlen Specter sent letters to both President Clinton and President Bush urging litigation against OPEC.[63] Senator Specter also argued in front of Congress on June 22, 2005, urging the legislature to find that OPEC's immunity from jurisdiction be nullified.[64]

In the past, OPEC's immunity from suit sprung from its classification as a governmental entity, which would place it under the Foreign Sovereign Immunities Act of 1976, providing that a foreign defendant shall be immune from suit in any federal or state court if the defendant qualifies as a "Foreign State" and unless a statutory exception to immunity applies.[65] However, Senator Specter argued against the courts, finding that OPEC Members' cooperation to fix pricing was a "governmental activity" as opposed to "commercial activity" and suggested that OPEC should be subject to suit in either U.S. federal court or the International Court of Justice at the Hague.[66] In June of 2005, a day before the Senator spoke, the Senate passed Senate Bill 555 by voice vote, also known as the "No Oil Producing and Exporting Cartels Act of 2005," which codified the ability to proceed against OPEC under antitrust laws.[67] Ultimately, however, U.S. administrations remained cold to the idea of sanctions or enforcement against OPEC even after further congressional demands for action. For example, the House of Representatives passed their version of the "No Oil Producing and Exporting Cartels Act" by a supermajority vote of 345–72 in May

60. *See generally* Int'l Ass'n of Machinists & Aerospace Workers v. Org. of the Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir. 1981).
61. *See id.* at 1361.
62. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).
63. *See* 151 CONG. REC. 13,658 (2005) (statement of Sen. Specter).
64. *See id.*
65. *See* 28 U.S.C §§ 1330, 1332, 1391(f), 1441(d), 1602–11 (2012).
66. *See* 151 CONG. REC. 13,660 (2005).
67. S. 555, 109th Cong. § 7(a) (2005).

2007, in the face of the direct threat of veto by then President George W. Bush.[68] These bills seemingly would provide the statutory exception that a Foreign Sovereign Immunities Act claim requires, which would allow federal courts to hear claims against OPEC.[69] Notwithstanding these attempts by Congress, there has been no action to pursue the organization thus far, leaving litigation as the one of the few avenues by which to challenge to OPEC although recent rulings may have foreclosed this as a viable option as well. In 2011, the Fifth Circuit Court of Appeals affirmed the dismissal of a major challenge to OPEC's antitrust violations.[70] In *Spectrum Stores, et al. v. Citgo Petroleum Corp*., et al., a group of gasoline retailers brought class actions against oil companies owned by OPEC Member Nations, alleging that the national oil companies conspired with OPEC to fix crude oil prices in the United States through production limits.[71] Although the suit was brought against oil production companies rather than the OPEC Member Nations themselves, the Fifth Circuit affirmed the dismissal by the district court under both the political question and act of state doctrines.[72] The Court of Appeals held that matters raised in the complaints "effectively challenge the structure of OPEC and its relation to the worldwide production of petroleum".[73] Citing the political question doctrine, the Court concluded that since the complaint implicated matters of foreign policy, which are in the purview of the executive and legislative branches, it lacked jurisdiction to adjudicate the claims.[74] Finally, citing the act of state doctrine, the Court of Appeals held that adjudication of the suit would call into question the acts of foreign governments concerning their natural resources, which was outside the sphere of the Judicial Branch.[75]

In the absence of a viable challenge to OPEC, the United States' reliance on imported oil has maintained a high level of dependence

68. *See* Watts, *supra* note 47.
69. S. 555, 109th Cong. § 7(a) (2005). (The proposed bill sought to specifically exempt OPEC from the Foreign Sovereign Immunities Act when it was acting in a commercial, rather than in a governmental, capacity. Further, the bill would specify that the Act of State Doctrine would not prevent courts from hearing anti-trust suits brought against foreign governments).
70. *See* Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 943 (5th Cir. 2011).
71. *See id.*
72. *See id.*
73. *See id.* at 943.
74. *See id.*
75. *See id.* at 955.

on many countries that are avowed enemies of U.S. interests.[76] Unlike sources such as Mexico and Canada, which along with Saudi Arabia are among the top three oil exporters to the United States, many OPEC Member Nations are not aligned with the United States ideologically and cannot be expected to be particularly sympathetic to fluctuations in the U.S. economy.[77] For example, since the price-per-barrel of oil is tied to the U.S. dollar, any decline in the value of the dollar has often led OPEC members to call for price increases in the price-per-barrel in order make up for any shortfall in revenues while, at the same time, exceeding their self-imposed quotas to bolster any loss of revenues that the member nations are experiencing.[78] Price increases such as this force the United States to spend more on imports while increasing the national debt, which in turn lengthens the time it will take for the economy to recover and the dollar's value to rebound from normal trading fluctuations in the world's currency markets.[79] While this is damaging in a concrete sense, it is mitigated by the fact that the price of oil is pinned to the dollar, and the normal standards of economics are skewed as far as they pertain to the United States. Most oil importing countries are forced to reserve capital in the form of U.S. dollars in order to maintain imports at the necessary levels, and oil exporting countries similarly hold, as their currency reserve, billions in U.S. dollars, the currency in which they are paid.[80] This reservation of reserve capital in U.S. dollars, in turn, creates a constant upwards pressure on the dollar, independent of economic conditions within the United States; this upward pressure on the dollar allows the United States to discount bond rates to other countries.[81] Because of these discounted bond rates, oil exporters and producers are able to invest profits

76. *See Chavez warns US over Iran policy*, BBC NEWS (May 14, 2006, 9:57 PM), http://news.bbc.co.uk/2/hi/americas/4771229.stm [http://perma.cc/X59T-B5H2] (archived Mar. 16, 2014).

77. *See Crude Oil and Top Petroleum Imports Top 15 Countries*, U.S. ENERGY INFO. ADMIN. (Nov. 29, 2011), http://www.eia.gov/pub/oil_gas/petroleum/data_publications/company_level_imports/current/import.html [http://perma.cc/QC49-ZQ6K] (archived Feb. 16, 2014).

78. *See* Grant Smith & Fred Pals, *OPEC Members Seek $100 Oil to Counter Dollar Weakness*, BLOOMBERG (Oct. 15, 2010, 8:32 AM) http://www.bloomberg.com/news/2010-10-15/opec-members-seek-100-a-barrel-oil-as-sliding-dollar-cuts-real-revenue.html [http://perma.cc/3U3Y-LFWW] (archived Feb. 16, 2014).

79. *See* Meg Handley, *How the National Debt Affects You*, U.S. NEWS & WORLD REPORT: MONEY (Mar. 31, 2011), http://money.usnews.com/money/personal-finance/articles/2011/03/31/how-the-national-debt-affects-you?page=2 [http://perma.cc/CD8C-PCLD] (archived Mar. 16, 2014).

80. *See* C.P. CHANDRASEKHAR & JAYATI GHOSH, INT'L DEV. ECON. ASSOCS., OIL PRICES AND THE US DOLLAR 1 (2008), http://www.networkideas.org/news/mar2008/oil_prices.pdf [http://perma.cc/78VV-5SEZ] (archived Mar. 16, 2014).

81. *See id.*

made on oil straight back into the U.S. economy, with virtually zero currency risk. This allows the United States to run higher, and virtually permanent, trade deficits at a more sustainable level than most other countries and also maintains relatively low prices on imported goods.[82] Oil producing states, such as Venezuela and Iran, that are ideologically opposed to the United States have a vested interest in seeing a weaker dollar and have pushed for oil to be priced in other currencies.[83]

Undoubtedly, it is in the United States' interest to maintain the price of oil in U.S. dollars, and prosecuting OPEC under international or federal law would be sure to alienate Member Nations with the potential to affect the currency to which oil is pinned.[84] Whether this is a valid reason for the U.S. restraint, the Federal Trade Commission has maintained two major reasons for non-enforcement against OPEC: the foreign sovereign immunity doctrine, which formed the basis of Senator Specter's challenge as discussed above, and the act of state doctrine, which similarly declares that a U.S. court will not adjudicate a politically sensitive dispute that would require the court to judge the legality of the sovereign act of a foreign state.[85] Similarly, although the European Union takes a strict view of cartels, extraterritorial application of EU competition law may be fundamentally limited by the treaty that establishes the role of the EU competition law itself.

In addition, since EU competition law focuses on trade between EU member states in furtherance of its goal of common market integration, application of treaty provisions to nations or states that are not members seems to leave the European Commission with a lack of meaningful enforcement options. Article 101 of the Treaty does not seem to contemplate governmental bodies in its applicable restrictions of "undertakings" when it refers to "companies," and European courts have consistently held that the European Commission's competition rules do not apply to conduct in the exercise of official authority or when an organization is acting as a public authority.[86]

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82. *See* Cóilín Nunan, *Oil, Currency and the War on Iraq*, THE FOUNDATION FOR THE ECONOMICS OF SUSTAINABILITY, http://www.feasta.org/documents/papers/oil1.htm [http://perma.cc/T6RR-GNZB] (archived Mar. 16, 2014).

83. *See* Carl Mortished, *Iran turns from dollar to euro in oil sales*, THE TIMES, Dec. 22, 2006, at 51.

84. *See* Faisal Islam, *When will we buy oil in euros?*, THE OBSERVER, Feb. 23, 2003, at 5.

85. *See* Underhill v. Hernandez, 168 U.S. 250, 254 (1897).

86. *See* Case C-309/99, Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten, 2002 E.C.R. I-1577, para 57 4 CMLR 913, (noting that according to the case law of the court, the Treaty rules on competition did not

The central role of the EU is to serve as an intergovernmental organization,[87] and as such, the sovereignty of its Member States plays a central role in the cohesiveness of the union. Further, although the EU's general approach emphasizes the supremacy of intergovernmental law, its approach to conflict encourages cooperation rather than punitive measures.[88] An example of this is the "leniency policy" discussed above, which, although it is one of the strongest tools used by the EU in competition law, it is also indicative of a recurring fundamental paradigm of cooperation. Similarly, the European Union appears to emphasize cooperation in its approach to OPEC. For example, in the first annual joint ministerial meeting in 2005, both the European Union and OPEC mutually expressed that they wanted to "deepen ties" after soaring oil prices prompted economists to cut growth forecasts for parts of Europe.[89] OPEC members, who were producing close to capacity, sought EU investment to increase their potential output, and in a joint statement, both powers indicated the intention to pursue "market stability, with reasonable prices that are consistent with the need for healthy economic growth and steady revenue streams for producing countries."[90]

Recently, the 14th Annual International Oil Summit, held in April of 2013, addressed issues such as global energy "inter-dependence," long term fossil fuel prospects, and the importance of "stable and fair" pricing.[91] Whether these meetings have succeeded in maintaining the stability of oil prices within the EU is debatable. EU press releases justify the meetings, however, as a "continued dialogue and exchanges of views," a dialogue elemental to improving understanding among all parties; as a result, the meetings

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apply to activity which is connected to the "exercise of the powers of a public authority."

87. *See* TFEU, *supra* note 38, art. 2(4).

88. *See generally* DANIELA NEPOTE & SYLVIE OCCELLI, INSTITUTO RICERCHE ECONOMICO SOCIALI DEL PIEMONTE, NO. 183/2004, BEYOND CORE-PERIPHERY RELATIONSHIPS IN THE EU COOPERATION (2004), *available at* http://www.digibess.it/fedora/repository/openbess:TO082-01643 [http://perma.cc/9PK5-89LK] (archived Mar. 17, 2014).

89. *See* Stephen Voss, *OPEC Assures EU of Ample Oil Supply at First Summit,* BLOOMBERG (June 9, 2005, 2:03 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ays86jjX.Ppw&refer=Europe [http://perma.cc/V5PQ-K2EH] (archived Feb. 16, 2014).

90. *Id.* (internal quotation marks omitted).

91. *See* Abdalla Sheik El-Badri, Sec'y Gen., OPEC, Keynote Speech at the 14th International Oil Summit (Apr. 4, 2013), *available at* http://www.opec.org/opec_web/en/2529.htm [http://perma.cc/4G43-VL25] (archived Mar. 16, 2014).

were "in line with the mutual interests of supporting oil market stability and predictability, for the benefit of the world at large."[92]

The mission statement contained within the OPEC Statute itself suggests that securing "an efficient, economic and regular supply of petroleum to customers" is one of the hallmarks of an organization that once used its power over the global oil market to send economies into cycles of inflation and recession.[93] With an ongoing dialogue and the tendency of the European Union to engage in cooperative relationship building, the EU is unlikely to initiate any maneuvers toward prosecution of OPEC as an "agreement in restraint of trade," and the European Union's ability to successfully do so within the constraints of the treaty's definition of "undertakings" is doubtful.

Both the United States and the European Union face formidable challenges in asserting an effective claim against OPEC, and even if successful, would need to consider the relevance of any international laws regarding sovereign immunities. Practical legal issues also include the nature of the jurisdiction to be asserted over OPEC, how a factual investigation could be conducted with respect to documents and witnesses located outside the United States, and the nature and enforceability of remedies, as judgments made against OPEC are bound to be politically counter-productive and problematic, with immediate retaliatory measures.

This is not to suggest that OPEC itself has not evolved since the 1970s when it was seen as fairly militant and willing to wield its power to declare embargoes that would throw economies around the world into downward spirals. In the past few decades, OPEC's recurring theme, as reflected in its mission statement, has been "stabilization of the markets," attempting to achieve a delicate balance between keeping oil prices high enough to produce a constant flow of income for Member Nations yet low enough to discourage consumers from diverting significant revenues into alternative sources of energy.[94] OPEC has largely succeeded, maintaining oil pricing at a level that has allowed for global economic growth while meeting the economic needs of its Member

92. *See* Press Release, European Comm'n, EU-OPEC hold Roundtable meeting to discuss Energy Policy (May 30, 2007), *available at* http://europa.eu/rapid/press-release_IP-07-729_en.htm?locale=en [http://perma.cc/84VL-UJKD] (archived Feb. 16, 2014).

93. *See Our Mission*, ORG. OF THE PETROLEUM EXPORTING COUNTRIES, http://www.opec.org/opec_web/en/about_us/23.htm [http://perma.cc/C3T6-LXUV] (archived Mar. 16, 2014).

94. *See* Blackwell, *supra* note 54.

Nations.[95] This has led to a strange dichotomy: on one hand, OPEC can be compared to a corporation, acting in a predictable way to maximize income for its "shareholders"—that is, its Member Nations. On the other hand, the fact that the global oil market is regulated by a loose association of countries that are often ideologically opposed to U.S. interests has led every U.S. President since Nixon to have promised, and failed, to reduce U.S. dependence on foreign oil.[96]

In the face of an ever-increasing global appetite for oil, OPEC has been viewed as a necessary evil, an organization that is outside the direct reach of U.S. and EU law, but one that both countries have relied on over time to stabilize oil prices and promote global economic growth.[97] In any case, both the United States and the European Union have shown a strong disinclination to prosecute OPEC due to both practical and political reasons, with the European Union suffering from the additional hurdle of strict interpretation of its competition law, which does not currently contemplate suits against sovereign states.[98] Now, and for the foreseeable future, notwithstanding a major shift in the political and economic climate, the viability of an antitrust suit being brought against OPEC is negligible.

III. HOW ECONOMICS MAY SUCCEED WHERE LAW HAS FAILED

For nearly half a century, against the backdrop of this uneasy, tenuous relationship between U.S. and EU consumers and Middle East producers, OPEC has maintained a nearly unassailable position as an oil "superpower." As recently as 2004, commentators were suggesting that "OPEC's hold on the oil market, and thus on the

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95. *See* Ayesha Daya & Ola Galal, *OPEC May Maintain Oil Output in Vienna on Uneven Economic Growth*, BLOOMBERG (Oct. 11, 2010, 5:30 PM), http://www.bloomberg.com/news/2010-10-10/opec-may-maintain-oil-output-at-vienna-meeting-on-uneven-economic-growth.html [http://perma.cc/PM42-DZ5J] (archived Mar. 16, 2014).

96. *See* Gus Lubin, *The Long List Of Presidents Who Promised To Reduce Foreign Oil Dependence And Failed*, BUS. INSIDER (Mar. 30, 2011, 11:35 AM), http://www.businessinsider.com/american-foreign-oil-dependence-2011-3?op=1 [http://perma.cc/5X9D-7CQ2] (archived Feb. 16, 2014).

97. *See* Tom Doggett, *U.S. wants OPEC to stabilize oil price*, REUTERS (May 22, 2009, 4:19 PM), http://www.reuters.com/article/2009/05/22/us-usa-opec-chu-interview-idUSTRE54L61620090522 [http://perma.cc/T429-KW9R] (archived Mar. 16, 2014).

98. *See* Cedric Ryngaert, *Domestic Remedies Against OPEC* 14–16 (Inst. For Int'l Law, Working Paper No. 145, 2010), *available at* http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP145e.pdf [http://perma.cc/M2HQ-WM9A] (archived Mar. 16, 2014).

world economy, looks set to grow sharply in the coming decades."[99] However, a series of random factors have seemingly conspired to undermine OPEC's stranglehold on the world's oil market and reduce its ability to use its oil production capabilities as a tool of political and financial coercion. These factors have inspired a variety of reactions, from elation on the part of conservative "hawks" heralding the eventual irrelevancy of OPEC, to uneasiness on the part of political leaders in Arab countries that depend on oil revenues to maintain political and economic stability.[100] Whether OPEC is simply diminishing in stature or is in full-scale decline, the situation has prompted leaders of OPEC Member Nations to take notice.[101]

While OPEC may not ever be completely irrelevant, as some commentators have suggested, it is unlikely that OPEC will be able to exert the almost unfettered control over oil prices that it has in the past. The most likely scenario is that the simple rules of economics will accomplish what decades of antitrust law has failed to do: reduce OPEC from a market regulator and cartel to a simple market participant competing against other oil producers for market share.

When examined as a whole, the effect of these individual events is almost uncanny in its cumulative ability to systematically and rapidly strip away power and influence that OPEC has fought for decades to build and maintain. The event that has seemingly had the greatest effect on OPEC's market share is the series of recent technological advances leading to an unprecedented shift in North American access to, and production of, shale oil and gas.[102] This "shale oil boom" was entirely unexpected; as recently as 2007, skyrocketing demand from China and India for oil led the International Energy Agency (IEA) to issue warnings that global demand was increasing in the face of supply shortfalls and urging

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99. Jad Mouawad, *Irrelevant? OPEC is Sitting Pretty*, Week in Review, N.Y. TIMES, Oct. 3, 2004, § 4, at 1, 3.

100. *See* Ambrose Evans-Pritchard, *US Shale threatens Saudi funding crisis and demise of OPEC*, TELEGRAPH (July 29, 2013, 7:21 PM), http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/10209822/US-shale-threatens-Saudi-funding-crisis-and-demise-of-OPEC.html [http://perma.cc/FU86-KPL4] (archived Mar. 16, 2014).

101. *See, e.g.*, Timur Moon, *Oil Price Slips as Saudi Prince Alwaleed bin Talal Warns of West's Fracking Boom*, INT'L BUS. TIMES (July 29, 2013, 11:26 AM), http://www.ibtimes.co.uk/articles/495259/20130729/prince-alwaleed-talal-oil-price-shale-gas.htm [http://perma.cc/P3MZ-N5YA] (archived Feb. 16, 2014).

102. *See* Asjylyn Loder, *Unforeseen U.S. Oil Boom Upends Markets as Drilling Spreads*, BLOOMBERG (Jan. 8, 2014, 2:35 PM), http://www.bloomberg.com/news/2014-01-08/unforseen-u-s-oil-boom-upends-world-markets-as-drilling-spreads.html [http://perma.cc/HKT7-2GWB] (archived Mar. 16, 2014).

oil exporting countries to increase production in the face of then record high prices.[103]

Noting that "solving energy problems is a global responsibility that demands action by all countries," the IEA explained that, as need for oil imports continued to grow and supplies leveled off in many industrialized nations, the world would become increasingly reliant on a smaller number of oil-exporting countries, such as the Middle East.[104] With economic growth in China and India alone accounting for a 70% increase in energy demand over the previous two years, the Member Nations of OPEC were positioned to adjust prices upwards, with the IEA predicting enormous increases in the price-per-barrel in the face of current production.[105] However, OPEC was kept in check by the surprising rise in Russian oil production, which was a mitigating factor that functioned to moderate prices even in the face of exploding demand.[106] At that time, Russian production levels almost rebounded to their Soviet-era all-time high of 11.4 million barrels per day, and the country rivaled Saudi Arabia as the world's top producer.[107] While the market was kept in check by Russian production, technological developments in enhanced oil recovery techniques, such as advances in hydraulic fracturing, led to the beginning of a meteoric rise in North American production, which made formerly non-recoverable oil accessible.[108]

These technological advances, combined with state-of-the art equipment and vast shale deposits, have led the IEA to predict that U.S. production will surpass Russia and Saudi Arabia, making the United States the world's top oil producer by 2015.[109] Nearly half of a century of presidential campaign promises notwithstanding, amid booming output from shale formations, the IEA noted that the United States will be close to energy self-sufficiency within the next

103. *See* Jad Mouawad & Julia Werdigier, *Warning on Impact of China and India Oil Demand*, N.Y. TIMES (Nov. 7, 2007), http://www.nytimes.com/2007/11/07/business/07cnd-energy.html?_r=0 [http://perma.cc/G3L5-PF9R] (archived Feb. 16, 2014).

104. *See id.*

105. *See id.*

106. *See* Mouawad, *supra* note 92.

107. *See* Thane Gustafson, *Russian Oil Industry at a Crossroads as Infrastructure Ages*, N.Y. TIMES (Dec. 4, 2012), http://www.nytimes.com/2012/12/05/business/global/russian-oil-industry-at-a-crossroads-as-infrastructure-ages.html?pagewanted=all [http://perma.cc/YW73-CEEG] (archived Feb. 16, 2014). *See also* BRITISH PETROLEUM, supra note 53.

108. *See* Loren Steffy, *How Long will the Fracking Oil Boom Last?*, FORBES (Dec. 11, 2013, 8:36 AM), http://www.forbes.com/sites/lorensteffy/2013/12/11/how-long-will-the-fracking-boom-last/ [http://perma.cc/T3CQ-8MA3] (archived Mar. 16, 2014).

109. *See* INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2013, at 458 (2013).

two decades.[110] In spite of declining production in the Middle East and Russia, economists for IEA have stated that they do not expect the United States to continue as the world's top producer beyond the 2020s, after which U.S. production will eventually plateau and decline.[111] Further, as aging production infrastructure in OPEC Member Nations is replaced and production technology catches up, Middle East oil may again regain dominance. However, it has also been suggested that replication of skyrocketing U.S. production may be more difficult than it appears.[112] A recent study has noted that the United States has access to 60% of the global availability of drilling rigs; moreover, the study revealed that 95% of U.S. drilling rigs can perform horizontal drilling, allowing for hydraulic fracturing at a level of intensity that may be impossible for other countries to achieve in the short term.[113] The boom in U.S production, followed closely by increases in Canadian production, has led other oil-producing countries to reevaluate their own production capabilities. Russia, currently at its production limit due to aging infrastructure and exhaustion of existing oil fields, is hoping that new horizontal technologies may result in a renaissance for the country's oil industry.[114]

The availability of the North American shale oil has reduced global demand for Middle East oil to the extent that Middle East politicians have expressed concern. As recently as July 2013, Saudi Prince Al-Waleed bin Talal said demand for oil from OPEC Member Nations states was "in clear and continuous decline" and noted Saudi Arabia's continuing reliance on oil estimated to comprise up to 92% of the country's budget.[115] Aside from simply expressing concern, OPEC members may have taken more direct measures to counter the effects of the U.S. energy boom. Amid concerns over the safety of hydraulic fracturing, the controversial method of production that is responsible for vast increases in oil and gas recovery, a 2012 film highlighting the dangers of the hydraulic fracturing process was revealed to have received financing from the United Arab Emirates, a member of OPEC and the world's third-

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110. *See id*.
111. *See id.* at 466.
112. LEONARDO MAUGERI, GEOPOLITICS OF ENERGY PROJECT, BELFER CTR. FOR SCI. & INT'L AFFAIRS, HARVARD KENNEDY SCHOOL, DISCUSSION PAPER #2013-05, THE SHALE OIL BOOM: A U.S. PHENOMENON 1 (2013), http://belfercenter.ksg.harvard.edu/files/The%20US%20Shale%20Oil%20Boom%20Web.pdf [http://perma.cc/4WPU-82M3] (archived Feb. 16, 2014).
113. *Id.*
114. *See* Gustafson, *supra* note 107.
115. *See* Moon, *supra* note 101.

largest oil exporter.[116] Critics of the film have contended that the UAE was "trying to drum up opposition to more U.S. oil production, which could compete with its crude exports."[117]

OPEC itself has been forced to downgrade its economic prospects, forecasting a global decline in demand for its oil, with a corresponding reduction in production.[118] However, reductions in demand by the United States have been mitigated by increases in demand by China and India as noted above, with China overtaking America as the largest buyer of oil on the international markets in September of 2013.[119] Nevertheless, even with falling Western demand, OPEC's reliance on demand from China may be misplaced should tensions break out in the Middle East. China's expanding economy and growing demand for resources require an increasing supply but stability of the supply chain may be equally important. This has led China to look to Canada as a potential supplier of crude oil.[120]

China is Canada's second biggest trading partner behind the United States, and although Canada currently exports an estimated 99% of their energy products to the United States, this may be changing shortly.[121] Costly delays in the construction of a massive pipeline between the Alberta sands oil fields may change Canadian oil export patterns. This pipeline, known as the Keystone XL Pipeline, would run from Edmonton, the "nerve center" of Canada's massive oil sands, down through Montana, South Dakota, Nebraska, Kansas, Oklahoma, and Texas, ending in Houston, and would provide the United States with a steady supply of affordable oil from a friendly trading partner that has growing production capabilities.[122] However, resistance from the environmental lobby

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116. *See* Steve Hargreaves, *Matt Damon fracking film backed by big OPEC member*, CNNMONEY (Oct. 1, 2012, 12:54 PM), http://economy.money.cnn.com/2012/10/01/matt-damon-fracking/ [http://perma.cc/XV2A-QVK8] (archived Feb. 16, 2014).

117. *Id.*

118. *See* WORLD OIL OUTLOOK, ORG. OF THE PETROLEUM EXPORTING COUNTRIES 56 (James Griffin et al. eds., 2013), http://www.opec.org/opec_web/static_files_project/media/downloads/publications/WOO_2013.pdf [http://perma.cc/532M-QV75] (archived Feb. 16, 2014).

119. Tom Holland, *Oil price heading for US$200 as China imports set to surge*, S. CHINA MORNING POST, Oct. 14, 2013, at 12, *available at* http://www.scmp.com/business/commodities/article/1331068/oil-price-heading-us200-chinas-imports-set-surge [http://perma.cc/F55P-6VVY] (archived Mar. 16, 2014).

120. *See What does Canada trade with China?*, CBC NEWS (July 12, 2012, 5:29 AM), http://www.cbc.ca/news/canada/what-does-canada-trade-with-china-1.1262424 [http://perma.cc/E7UE-9UW2] (archived Mar. 16, 2014).

121. *See id.*

122. *See* Marin Katusa, *If U.S. Says No To Canadian Oil Sands Pipeline, China Will Say Yes*, FORBES (June 30, 2011, 1:51 PM), http://www.forbes.com/sites

has mired the crucial project in a contentious debate, and pressure on legislators has led to costly regulatory delays.[123] While the United States has gone back and forth over whether to construct the pipeline, China has expressed a willingness to pay for construction of the "Northern Gateway Pipeline," a proposed pipeline between Alberta's oil sands to coastal British Columbia, from which oil could be sent directly across the Pacific to supply China's growing demand.[124]

The Canadian government has expressed interest in increasing trade with China, and delays in the Keystone XL pipeline approval may provide the impetus to begin diverting oil from the United States to China.[125] China has invested billions in Canadian oil and gas projects and in Canadian oil companies such as Syncrude, Athabasca Oil Sands, and Penn West Energy.[126] Securing access to Canadian oil would be a crucial, strategic victory for China because of the ongoing instability in the Middle East. As of 2010, roughly half of China's imported oil arrived from the Middle East, including oil from countries with declining outputs or those that are classified as inherently unstable, such as Libya and Iraq.[127]

Notwithstanding political instability of the producing countries themselves, transport of Middle East oil is also a problem for China. A large percentage of oil exported to Asia must pass through the Strait of Hormuz, a narrow strait between the Gulf of Oman and the Persian Gulf, which is the only sea passage from the Persian Gulf to the open ocean.[128] With Iran on one side and the United Arab Emirates on the other (both of which are OPEC Member Nations), the Strait of Hormuz is one of the world's most strategically important oil transit routes.[129] According to a 2011 report by the U.S. Energy Information Administration, about 20% of the world's

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/energysource/2011/06/30/if-u-s-says-no-to-canadian-oil-sands-pipeline-china-will-say-yes/ [http://perma.cc/W9RS-HQK5] (archived Feb. 16, 2014).

123. *See id.*

124. Claudia Cattaneo, *PetroChina bids to help build $5.5-billion Northern Gateway Pipeline*, FINANCIAL POST, March 28, 2012, at FP1.

125. *See id.*

126. Amy Crawford, *Battle for the Arctic*, SMITHSONIAN, Apr. 2013, at 20.

127. Damien Ma, *Dependence on Middle Eastern Oil: Now It's China's Problem, Too*, THE ATLANTIC (July 19, 2012, 2:20 PM), http://www.theatlantic.com/international/archive/2012/07/dependence-on-middle-eastern-oil-now-its-chinas-problem-too/259947/ [http://perma.cc/LUN6-PMCK] (archived Feb. 16, 2014).

128. *See Strait of Hormuz is chokepoint for 20% of world's oil*, U.S. ENERGY INFO. ADMIN. (Sept. 5, 2012), http://www.eia.gov/todayinenergy/detail.cfm?id=7830 [http://perma.cc/RN3J-DSJV] (archived Feb. 16, 2014).

129. *See id.*

crude oil and about 35% of petroleum traded by sea passed through this route in 2011 alone.[130] Of this amount, roughly 85% of these crude oil exports went to Asian markets, with Japan, India, South Korea, and China being the largest destinations.[131] With such an important passage located in a region of ongoing political instability, China oil imports are exposed to a significant risk: as recently as 2012, Iran threatened to close the Strait of Hormuz in response to increased UN sanctions sparked by Iran's pursuit of nuclear technology and again in response to a recent EU oil embargo of Iran.[132]

In the future, increasing reliance on Middle Eastern oil may also have diplomatic implications for China-U.S. relations. Increasing U.S. energy independence may make goodwill on the part of the Middle East strategically dispensable for the United States, allowing more freedom to take diplomatic actions that further U.S. interests but indirectly damage Chinese interests. For example, lessening reliance on Middle Eastern oil may free the United States from restraints it has been under in dealing with unfriendly Middle Eastern countries, making it more willing to disrupt oil output in times of conflict at little risk to its own supply. However, China's increasing reliance on Middle Eastern oil at a time of decreasing U.S. reliance may leave China more susceptible to diplomatic pressure by the United States if the United States were to support regime change or use sanctions against a politically unfriendly Middle Eastern country in order to gain leverage over China. Further, the presence and influence of the United States in the Middle East may be a factor in the region's stability. Although China is now the single greatest purchaser of Middle Eastern oil, a United States withdrawal from the Middle East may bring about even more political instability with which China is ill equipped to handle.[133] Securing access to Canadian oil would allow China to mitigate both the risks of oil transportation disruptions and its increasing reliance on a politically unstable region; compared with other sources of oil, Canada would be a stable, reliable supplier that would help China satisfy its growing demand. Further, China's increased reliance in Canadian oil would weaken OPEC's control of the oil market.

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130. *Id.*
131. *Id.*
132. *See* Yang Lina, *Iran threatens to close Strait of Hormuz if sanctions increase: lawmaker*, XINHUANET (July 4, 2012, 10:02 PM), http://news.xinhuanet.com/english/world/2012-07/04/c_131695620.htm [http://perma.cc/7JC3-3NAM] (archived Feb. 16, 2014).
133. *See* Ma, *supra* note 127.

IV. OPEC'S EFFECTIVENESS AS A MARKET PARTICIPANT RATHER THAN AS A MARKET REGULATOR

As noted above, while the explosive growth in the U.S. oil market may not reduce OPEC to a state of irrelevance in the world oil market, it will certainly not have the control over the market it has exercised in the past. That alone may be problematic for an organization that imposes production limits on its Member Nations in order to control pricing. If OPEC were to lose its ability to set market prices by limiting production, the benefits enjoyed by Member Nations would disappear; it would retain the weaknesses of a cartel without corresponding benefits. Further, the weaknesses in this case would be more pronounced for Member Nations that have, until recently, enjoyed a steady stream of oil profits flowing into their economies.

One major problem for the organization is that it is made up of independent sovereign nations. Additionally, oil production aside, each nation has different means of promoting economic growth and diversification of industry. Each Member Nation has different trading partners, geographic boundaries, and barriers to trade, and many have different cultures, languages, and monetary systems. For example, aside from oil production, Nigeria, Iran, and Venezuela are vastly different, with different political, religious, and social paradigms. While each nation undoubtedly counts on oil revenues, some countries may have greater natural resources, domestic production capabilities, or alternate revenue streams that they use to fund their economies. Member Nations with diversified industries and economies will undoubtedly be able to handle fluctuations in oil prices better than countries that count on oil revenues to fund the majority of their national budget. However, poorer Member Nations that have relied on oil revenues without concurrent diversification of their economies, or those that have failed to invest in infrastructure or generation of employment opportunities, may be unable to maintain sustainable economic growth due to future fluctuations in oil revenues.[134]

The governments of poor Member Nations may be completely dependent on oil export revenues to fund their economies, a large part of which may be government and social programs, and a certain percentage of oil revenues may be diverted to subsidies for poor citizens. OPEC Member Nations generally need oil to remain at a certain price-per-barrel to fund their economies, which is known as

134. John L. Hammond, *The Resource Curse and Oil Revenues in Angola and Venezuela*, 75 SCIENCE & SOC'Y 348, 352 (2011).

the "fiscal break-even price."[135] For example, as of 2013, Saudi Arabia had a fiscal break-even cost of $98 U.S. dollars per barrel, while Ecuador required oil to be priced at $121 U.S. dollars per barrel.[136] Iran required the highest cost per barrel at $144.[137] OPEC Member Nations may depend completely on oil revenues to fund social programs, and with rising populations, the Member Nations find that they need higher oil prices each year just to make their budgets balance.[138]

With OPEC able to regulate oil pricing through market manipulation, the revenue needs of the Member Nations may consistently be met. However, when forced to compete on the open market, Member Nations that have not developed a strong economy and a sound tax base may be unable to maintain their current expenditures. In the wake of the 2010 demonstrations, civil uprisings, and regime changes known as the "Arab Spring,"[139] leaders across the Middle East may have cause for concern if fluctuating oil prices lead to underfunding of social programs in the face of high unemployment and limited economic opportunity.

With the ability to control oil prices, the Member Nations may find membership in OPEC to be a benefit that they cannot forego, but without that benefit, there may be little reason to abide by OPEC production limits. As supply from non-OPEC oil producers increases to meet global demand, OPEC will have a diminishing role in market pricing, and the normal economics of supply and demand may take over. If unforeseen events cause global demand to level out or decrease, the resulting over-supply of the market would put a downward pressure on the price of oil. In this case, individual OPEC member nations would have no choice but to ignore production limits in order to make up for profit shortfalls if the price of oil falls below their individual fiscal break-even price.

In the event oil prices do fall that low, OPEC Members would have zero incentive to abide by production limits (which typically drive the price of oil upwards) because any supply shortfalls would

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135. Ali Aissaoui, *Modeling OPEC Fiscal Break-Even Oil Prices: New Findings and Policy Insights, Economic Commentary, Arab Petroleum Investment Corporation* 2 (2013), http://www.mees.com/en/articles/8163-modeling-opec-fiscal-break-even-oil-prices-new-findings-and-policy-insights [http://perma.cc/BG5S-TCRM] (archived Mar. 16, 2014).

136. *Id.* at 2.

137. *Id.*

138. Yadullah Hussain, *OPEC's gift to oil sands producers: high oil prices*, FINANCIAL POST, July 6, 2012, at B5.

139. *See generally* Adeel Malik & Bassem Awadallah, *The Economics of the Arab Spring* 2 (Ctr. for the Study of African Econ., Working Paper WPS/2011-23, 2011), *available at* http://www.csae.ox.ac.uk/workingpapers/pdfs/csae-wps-2011-23.pdf [http://perma.cc/T37M-FZKY] (archived Feb. 16, 2014).

be covered by non-OPEC producers. At that point, it is likely that collusive cartel behavior would be abandoned entirely because the inherent collusion for joint-profit maximization means that each cartel participant is restrained from competing against other cartel members in order to maximize individual profits.[140] Once OPEC loses the ability to regulate global oil prices through production limits and price fixing, individual Member Nations have no incentive to abide by output restrictions and may in fact have no choice but to ignore them.

Further, the explosion in U.S. production has differing effects on the various Member Nations of OPEC. For example, Nigerian oil exports have been directly affected by the spike in U.S. domestic production because the oil being produced from the U.S. shale plays is the highly prized "light, sweet crude" that Nigeria has historically exported to the United States.[141] Since July 2010, the United States, once Nigeria's biggest customer, has cut imports from more than 1 million barrels a day to 543,000 barrells as of October 2012.[142] Angola, another OPEC Member Nation, finds itself in a similar situation, with its market in the United States cut in half to 200,000 barrels a day, down from an average of 513,000 barrells in 2008.[143] Experts are predicting that, before mid-2014, the United States and Canada will stop importing light, sweet crude from West Africa altogether.[144] Algeria, another OPEC member, has also seen its exports of light, sweet crude to the United States decline by about half, but it produces a number of different types of crude oil that it has historically sold to China.[145] Although Algeria has an established market within China and other Asian consumer countries, it may now face competition in those countries from Nigeria and Angola, and the resulting influx of light, sweet crude from West Africa has the potential to exert a downward pressure on

140. *See* Anton-Giulio Manganelli, *Cartel Pricing Dynamics, Price Wars, and Cartel Breakdown,* 19–20 (Toulouse School of Economics, Research Group: Behavioral and Experimental Economics, Working Paper No. 12-309, 2012), *available at* http://www.tse-fr.eu/images/doc/wp/bee/wp_tse_309.pdf [http://perma.cc/JUN4-CX7F] (archived Mar. 16, 2014).

141. *See* Matthew Philips, *Falling U.S. Oil Imports Will Reshape The World Crude Market,* BLOOMBERG BUSINESSWEEK (Jan. 16, 2013), http://www.businessweek.com/articles/2013-01-16/falling-u-dot-s-dot-oil-imports-will-reshape-the-world-crude-market [http://perma.cc/A3CL-5UTT] (archived Feb. 16, 2014).

142. *Id.*

143. *Id.*

144. *Id.*

145. *See* Julia Payne & Emma Farge, *Once prized African oil struggles to find new markets*, REUTERS (Feb. 26, 2013, 3:55 PM), http://uk.reuters.com/article/2013/02/26/oil-africa-exports-idUKL5N0B7I6H20130226 [http://perma.cc/K8HJ-XYUG] (archived Mar. 16, 2014).

prices.[146] Even when abiding by OPEC production limits, Nigeria and Angola are now finding themselves with a surplus of oil,[147] which creates an incentive to compete against fellow OPEC Member Algeria in order to gain a foothold into the Chinese market. This is one of the primary weaknesses of cartels: individual members may attempt to garner a larger share of the market and earn larger profits by undercutting the cartel itself. Once cartel members begin competing against each other, the cartel agreement has the potential to be completely undermined by sellers who may attempt to quickly capture a large share of the market by discounting their price.[148]

CONCLUSION

It is unclear whether the meteoric expansion of U.S. oil production will result in the end of OPEC's role as an unconstrained cartel with stranglehold on the global economy or merely result in a temporary decrease in stature—not a "cause for worry," as stated by one OPEC delegate.[149] Currently, it appears that individual Member Nations' reactions to coming market fluctuations will determine whether economic changes leave OPEC a cartel in name only.

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146. *See id.*
147. *See id.*
148. *See* Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 64 (2006).
149. Ajay Makan & Javier Blas, *Oil Guru Says U.S. Shale Revolution is Temporary*, FINANCIAL TIMES, (May 29, 2013 4:53 p.m.) http://www.ft.com/intl/cms/s/0/281b118e-c870-11e2-acc6-00144feab7de.html#axzz2z4yXxjyJ [http://perma.cc/QRQ8-32L3].