

**Testimony of Seth Bloom**

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United States House of Representatives

Committee on the Judiciary

Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on “Accountability for OPEC: H.R. \_\_\_\_, the ‘No Oil Producing and Exporting Cartels Act.’ ”

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Chairman Marino, Ranking Member Cicilline, and distinguished members of the Subcommittee –

Thank you for inviting me to testify on this important topic today. From 1999 to January 2013, I served as a counsel on the Senate Judiciary Committee’s Antitrust Subcommittee, the last four years as the Subcommittee’s General Counsel. I worked for Sen. Herb Kohl, who was Ranking Member of the Subcommittee when I began working there, and served as Chairman from 2007 until his retirement at the end of 2012. I am now an attorney in private practice specializing in antitrust law and competition policy, and I want to stress at the outset that none of my clients have any interest in the issues I will discuss today. My testimony is entirely my own and solely represents my own views.

One of our most important legislative initiatives during the time I worked on the Senate Antitrust Subcommittee staff was a bill we named the “No Oil Producing and Exporting Cartels Act” or NOPEC. NOPEC is a very short bill but I believe would have a very large effect if enacted. NOPEC would make illegal under U.S. antitrust law the activities of foreign nations who participate in oil cartel designed to limit the supply or raise the price of oil imported into the U.S. It would amend the Sherman Act – our nation’s basic antitrust law – to simply and clearly state that it would be illegal for any foreign state, or instrumentality or agent of any foreign state,

to take joint action to (1) limit the production of oil or any other petroleum production; to (2) set of maintain the price of oil or any other petroleum product; or (3) to otherwise take any action in restraint of trade for oil or any other petroleum product when such collective action has a direct, substantial and reasonably foreseeable effect in the United States.

NOPEC was first introduced in June 2000 by Sen. Kohl and nine bipartisan co-sponsors,<sup>1</sup> and was passed unanimously out of the Senate Judiciary Committee that year. Sen. Kohl would introduce the NOPEC legislation with a large list of bipartisan cosponsors in every remaining Congress in which he served (a total of six more times), and it passed out of the Judiciary Committee in each Congress, except one, with a unanimous vote each time. Companion legislation was introduced here in the House on several occasions.<sup>2</sup> In 2007, the NOPEC bill passed with overwhelming majorities on both the House and Senate floors – with 70 votes in the Senate, and 345 votes in the House, but in different legislative vehicles. The two measures were never reconciled.

I was very encouraged to learn that the Subcommittee was holding this hearing today, and that several members of the Subcommittee were considering reintroducing this legislation. The need for this NOPEC legislation is every much as real today as it was when Sen. Kohl first introduced it in the year 2000.

The OPEC oil cartel – a selfish conspiracy of 14 oil producing nations<sup>3</sup> – today continues its decades long efforts to limit the supply and therefore inflate the worldwide price of oil. In November 2016, OPEC announced that 11 member nations would cut supply by a collective 425

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<sup>1</sup> The No Oil Producing and Exporting Cartels Act (NOPEC), S. 2778 in the 106<sup>th</sup> Congress, introduced June 22, 2000.

<sup>2</sup> The 2007 version of the NOPEC bill in the House of Representatives was H.R. 2264 in the 110<sup>th</sup> Congress. It was sponsored by then Judiciary Committee Chairman Conyers, Rep. Chabot, and 12 others.

<sup>3</sup> The 14 nations are listed on OPEC's website - [http://www.opec.org/opec\\_web/en/about\\_us/25.htm](http://www.opec.org/opec_web/en/about_us/25.htm)

million barrels of oil in 2017, a cut of about 4.6% for each member state.<sup>4</sup> And these supply cuts worked – the price of Brent crude rose about \$ 10 per barrel during 2017.<sup>5</sup> Indeed these supply cuts have worked so well in OPEC’s view that in November 2017, OPEC agreed to extend the supply cuts throughout 2018, this time with the addition of Russia to the agreement.<sup>6</sup> And oil prices continue to rise today.<sup>7</sup> The FTC has estimated that 85% of the variability of the price of gasoline is caused by changes in the price of crude oil.<sup>8</sup> So millions of American consumers feel the effect of the OPEC conspiracy every time they visit the gas pump.

Such blatantly anti-competitive conduct by the member nations of the oil cartel to fix the price of oil by limiting supply violates the most basic principles of free markets and fair competition and should not be tolerated. As the Supreme Court stated in 2004, cartels are the “supreme evil of antitrust.”<sup>9</sup> Because the law of supply and demand establishes that an agreement to limit output is tantamount to an agreement to fix price, courts have held as per se illegal agreements to limit supply, limit production, or set quotas just as are agreements to fix price. As Senator Kohl stated at the Senate Judiciary Committee’s hearing on the NOPEC bill in 2007, “[i]f the members of OPEC were private companies and not nations, they long ago would have been prosecuted for engaging in illegal price fixing.”<sup>10</sup>

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<sup>4</sup> <https://www.bloomberg.com/gadfly/articles/2018-01-30/opec-supply-cuts-year-one-report-card-in-5-charts>

<sup>5</sup> *Id.*

<sup>6</sup> <https://www.bloomberg.com/news/articles/2017-11-30/opec-signals-oil-supply-cuts-will-be-extended-until-end-of-2018> On April 20, 2018, the Wall Street Journal reported that these production cuts could even be extended into 2019. <https://www.wsj.com/articles/opec-russia-oil-officials-hint-at-extending-production-cuts-1524225441>

<sup>7</sup> <https://www.eia.gov/outlooks/steo/marketreview/crude.php>

<sup>8</sup> Testimony of William E. Kovacic, General Counsel, Federal Trade Commission at the Hearing of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, April 7, 2004 (S. Hrg. 108-604, Serial No. J-108-85), at p. 15.

<sup>9</sup> *Verizon Communications, Inc., v. Trinko*, 540 U.S. 398, 408 (2004).

<sup>10</sup> Testimony of Sen. Herb Kohl at the Hearing of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, April 7, 2004 (S. Hrg. 108-604, Serial No. J-108-85), at p. 4.

But OPEC member nations hide beyond the doctrine of sovereign immunity and act of state to claim immunity from antitrust prosecution for their illegal price fixing cartel. So the solution is simple -- legislatively eliminate these protections for members of the oil cartel. The sovereign immunity statute (the Federal Sovereign Immunity Act, or FISA), already contains an exception for commercial activity of nations.<sup>11</sup> And what could be more commercial than the sale of oil for profit? Despite this, a mistaken 1979 decision of a federal district court in California in the International Association of Machinists case ruled that OPEC and its member nations were immune from antitrust scrutiny under FISA.<sup>12</sup> Congress should overturn this precedent by passing legislation – as Senator Kohl’s NOPEC bill did -- that makes clear that nations that engage in oil cartels will not gain the benefit of sovereign immunity. Likewise, the legislation should make clear that the act of state doctrine cannot protect from antitrust liability nations that participate in oil cartels. While the act of state doctrine was originally a judicially created doctrine based on principles of comity in which the judicial branch would decline to rule on politically sensitive questions involving foreign governments, the case law is clear that it may be amended or repealed by Congress, and this has already occurred on several occasions.<sup>13</sup>

While I was counsel to the Senate Antitrust Subcommittee, I was frequently asked what difference the enactment of NOPEC would make. In my judgment, enactment of such a statute could make a real difference in restraining the anticompetitive actions of the oil cartel. First, many of the OPEC member nations have extensive assets and bank holdings in the United States. Should the Justice Department file suit under NOPEC and win, the U.S. could seize those assets.

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<sup>11</sup> 28 U.S.C. § 1602(a)(2).

<sup>12</sup> International Association of Machinists and Aerospace Workers v. OPEC, 447 F. Supp. 553 (C.D. Cal. 1979); *aff’d* 649 F.2d 1354 (9th Cir. 1981).

<sup>13</sup> An example is the so called “Hickenlooper Amendment,” 22 U.S.C. § 2370(e)(2). *See also*, Indus. Inv. Dev. Corp. v. Mitsui & Co., Ltd., 594 F.2d 48, 57 n. 7 (5th Cir. 1979); West v. Multibanco Comermex, S.A., 807 F.2d 820, 829.

Second, the mere threat of bringing lawsuits under NOPEC will give the U.S. an important tool to employ in negotiations with the oil cartel. This threat will likely restrain OPEC as it considers production cutbacks. But the decision to bring an action under NOPEC will also remain with the Justice Department. As we drafted it, NOPEC does not create any private right of action. The decision on whether to use this tool in combatting the oil cartel would always remain with the Justice Department and senior members of the executive branch. They can use this tool as they wish – to file an antitrust lawsuit, to jawbone OPEC in diplomatic discussions, or even to defer from any any action should they judge foreign policy considerations warrant it.

As Sen. Kohl said in introducing the NOPEC bill in 2009, “[t]he most fundamental principle of a free market is that competitors cannot be permitted to conspire to limit supply or fix price. There can be no free market without this foundation. We should not permit any nation to flout this fundamental principle.”

Enactment of the NOPEC legislation would, for the first time, enable our Justice Department to take strong legal action to combat the illegal price fixing conspiracy of the oil cartel. It will, at a minimum, deter nations that seek to conspire to fix oil prices. And it would be the first real weapon the U.S. government has ever had to combat the oil cartel from its seemingly endless cycle of supply cutbacks designed raise the price of such a crucial commodity as oil.

I commend the Subcommittee holding this hearing today and for considering such an important piece of legislation. I am happy to answer to any questions you may have.