

# WebMemo



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## Time for Congress to Lift OPEC's Immunity

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This week, the House is likely to pass the No Oil Producing and Exporting Cartels Act of 2007 (NOPEC, HR. 2264). This bill, sponsored by Representatives John Conyers (D-MI) and Steve Chabot (R-OH), would allow the federal government to sue the Organization for Petroleum Exporting States (OPEC) for antitrust violations. Similar legislation (S. 879) is pending in the Senate, sponsored by Senators Herb Kohl (D-WI) and Arlen Specter (R-PA). At a time when oil prices are climbing to ever-higher levels, fighting OPEC's anticompetitive practices would be a welcome first step towards reestablishing the free market in this strategically important sector. This is long overdue and points the way toward a second step: allowing private antitrust suits against OPEC.

**The Intolerable Status Quo.** Since its inception in 1960, OPEC, which is dominated by Persian Gulf producers, has successfully restricted its member states' petroleum production, artificially distorting the world's oil supply to line its members' pockets. Member states' production quotas are determined at semi-annual meetings of members' petroleum ministers and are at times changed through telephone consultations. Several times, this supply-fixing strategy has brought devastation to the U.S. and global economies:

- In 1973, OPEC's actions in response to U.S. support for Israel, which was attacked in the Yom Kippur War, resulted in a worldwide economic recession that lasted from 1974 to 1980.
- In 1980, OPEC's failure to increase production in the face of the Iranian revolution resulted in historically high oil prices of \$81 per barrel (in 2005 dollars).
- In 1990, OPEC refused to increase production sufficiently to keep prices stable as Saddam Hussein occupied Kuwait.
- Lately, OPEC's resistance to add productive capacity has sent oil prices to \$70 a barrel, once again endangering economic growth worldwide.

The cartel's operations ensure that its members' oil and gas economies remain insulated from foreign investment flows. Members of OPEC have not worked to enhance the rule of law and property rights and have imposed severe restrictions to prevent foreign investors from owning upstream production assets (oil fields and pipelines). This is a testament to the cartel's de facto monopoly over the petroleum market. Indeed, the only serious challenge to the organization came in 1978 when a U.S. non-profit labor association, the International Association of Machinists and Aerospace Workers (IAM), sued OPEC under the Sherman Antitrust Act, in *IAM v. OPEC*. But the case was rejected in 1981 by the U.S. Court of Appeals for the Ninth

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Circuit. OPEC, the court affirmed, could not be prosecuted under the Sherman Act due to the foreign sovereign immunity protection it claimed for its member states.

That decision was wrong. Government-owned companies that engage in purely business activities do not warrant sovereign immunity protection according to prevailing legal doctrines.<sup>1</sup>

High oil prices, which OPEC facilitates, serve to transfer wealth from Western consumers to petroleum producers. This wealth transfer funds terrorism through individual oil wealth and government-controlled “non-profit” foundations. It also permits hundreds of millions of dollars to be spent on radical Islamist education in madrassahs (Islamic religious academies).

Furthermore, the oil-cash glut in the Gulf states and elsewhere empowers resistance to much-needed economic reform in oil-producing countries. State subsidies for everything from health care to industry to bloated bureaucracy continue unabated, funded by Western consumers.

**Congress Gets Into Action.** Growing concerns over energy prices have prompted Congress to examine the legal hurdles that prevent the United States from defending its economic and national security interests.

In the early part of 2005, a group of senators led by Senator Mike DeWine (R–OH) introduced the “No Oil Producing and Exporting Cartels Act” (S.

555), known as NOPEC, to amend the Sherman Act to make oil-producing and exporting cartels illegal.

The bill has now returned the Senate calendar. The House and Senate now have a unique opportunity to:

- **Join forces in defending American businesses and consumers.** NOPEC would send a strong and long-overdue signal to OPEC oil barons that they must stop limiting production and investment access.
- **Allow private suits against OPEC.** If OPEC is to be reined in, individuals and companies that it has damaged must also be allowed to bring suits against the cartel. As the *International Association of Machinists (IAM) v. OPEC* made clear, Congress must amend the Sherman Act to allow these suits.<sup>2</sup> Reform should not begin and end with the DeWine–Kohl legislation.

**Conclusion.** The No Oil Producing and Exporting Cartels Act of 2007 would place much needed pressure on OPEC. It is time for the cartel to cease its monopolistic practices. Otherwise, the American people can expect more of the same from OPEC—insufficient production and higher energy bills.

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1. See 28 U.S.C. § 1330 *et seq.*

2. *International Association of Machinists (IAM) v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981), *aff'ing* 477 F. Supp. 553 (C.D. Cal. 1979), *cert. denied*, 454 U.S. 1163 (1982).