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NO OIL PRODUCING AND EXPORTING CARTELS ACT OF 2007

MAY 22, 2007.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany S. 879]

The Committee on the Judiciary, to which was referred the bill (S. 879), to amend the Sherman Act to make oil-producing and exporting cartels illegal, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

I. PURPOSE AND NEED FOR S. 879

A. INTRODUCTION

The purpose of S. 879, the No Oil Producing and Exporting Cartels Act of 2007 ("NOPEC" Act), is to subject to U.S. antitrust law foreign nations acting as cartels to raise the price of petroleum products in the United States through anticompetitive means. This legislation will make it illegal for any foreign state, or any instrumentality or agent of a foreign state, to act collectively with another foreign state, or any instrumentality or agent of a foreign state, to limit the production or set the price for oil, natural gas, or any petroleum product, or take any other action in restraint of trade for such product when the action has a direct, substantial

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and reasonably foreseeable effect on the market for oil, natural gas, or any petroleum product in the United States. This legislation will authorize the Attorney General to file suit against nations or other entities that engage in such activity. In addition, it will expressly specify that the doctrines of sovereign immunity and "act of state" do not exempt nations that participate in oil cartels from antitrust law.

B. NEED FOR LEGISLATION

1. Factual Background

The actions of the Organization of Petroleum Exporting Countries (OPEC) oil cartel to have limit the supply of crude oil in order to raise prices directly caused the price of oil, and therefore gasoline, home heating oil, and other petroleum products to increase drastically, harming millions of American consumers and the U.S. economy generally. The Federal Trade Commission has estimated that 85% of the variability of the price of gasoline is caused by changes in the worldwide price of crude oil.[1] The worldwide price of crude oil is, in turn, determined by supply limitations and supply quotas imposed by OPEC. As of May 4, 2007, the average worldwide price of crude oil was more than $63 per barrel, an increase of 16% from the price in the first week of January 2007, and an increase of 80% from the beginning of January 2005.[2] The retail price of gasoline reached record levels in the United States in the last year, with prices for regular unleaded frequently approaching (and sometimes exceeding) $3.00 per gallon. While prices temporarily receded last fall, the general trend has been significantly upwards, and prices continue to rise even today. On May 7, 2007, national average gasoline prices stood at more than $3.00 per gallon, a 30% increase since the beginning of the year.[3]

As the Committee has examined gas price changes, one fact has remained consistent—any move downwards in price ends as soon as OPEC decides to cut production. The statement of the oil cartel's leaders confirms that this is their intent. Referring to the 18% rise in worldwide crude oil prices since the start of 2007, OPEC President Mohammed al-Hamli commented "we had a bad situation at the beginning of the year. It is much better now." The difference was the combined output cuts of 1.7 million barrels of oil a day adopted by OPEC last October and December, which had the effect of driving up crude oil prices and, thus, the price of gasoline in the U.S.

The consequence for our economy and American consumers of the actions of the oil cartel are serious and growing. Americans are forced to spend more of their hard-earned money when they visit the gas pump as a result of rising prices. Higher oil prices also harm our economy by driving up the cost of transportation and shipping. These costs are then passed on to consumers in the form of higher prices for manufactured goods. Higher oil prices also

[1] Testimony of William E. Kovacic, General Counsel, Federal Trade Commission at Hearing of the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Senate Judiciary Committee, April 7, 2004. (S. Hrg. 108–604, Serial No. J–108–85 at page 15.)

[2] Data from Weekly Petroleum Status Report, U.S. Energy Information Administration, found at http://www.eia.doe.gov/pub/oil__gas/petroleum/data__publications/weekly__petroleum__status__report/current/pdf/table13.pdf.

[3] Data from U.S. Energy Information Administration found at http://tonto.eia.doe.gov/oog/ftparea/wogirs/xls/pswrgvwall.xls#'1-Regular Conventional'!A1.

mean consumers and businesses must pay higher heating bills in the winter and higher cooling bills in the summer.

2. Need for Change to Law

The blatantly anti-competitive conduct by the oil cartel violates the most basic principles of fair competition and free markets enshrined in our antitrust law for over a century. There is no doubt that if OPEC were a group of international private companies rather than foreign governments, their actions would constitute an illegal price fixing scheme. Cartels, in the words of the U.S. Supreme Court, are the "supreme evil of antitrust." *Verizon Commc'ns, Inc. v. Trinko*, 540 U.S. 398, 408 (2004). "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). 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 *per se* illegal agreements to limit supply, limit production, or set quotas just as agreements to fix price. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 406–407 (1945); American Bar Association Section of Antitrust Law, *Antitrust Law Developments* (4th Ed. 1997) at pages 82–83.

a. Sovereign Immunity

This NOPEC legislation is necessary, however, because OPEC members have used the shield of "sovereign immunity" to escape accountability for their price-fixing activities under antitrust law. In *International Ass'n of Machinists and Aerospace Workers v. OPEC*, 447 F. Supp. 553 (C.D. Cal. 1979), *aff'd* 649 F.2d 1354 (9th Cir. 1981), a federal district court ruled that OPEC and its member nations were immune from suit under the antitrust laws pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. 1330 *et seq.* (FSIA). This decision has been widely criticized.[4] The FSIA already recognizes that the "commercial" activity of nations is not protected by sovereign immunity. 28 U.S.C. 1602 (a)(2). And it is hard to imagine an activity that is more obviously commercial than selling oil for profit, as the OPEC nations do. Thus, many commentators argue that sovereign immunity should not protect the activities of OPEC member nations.[5] The legislation settles this issue, overruling *International Ass'n of Machinists* by (i) expressly establishing that the sovereign immunity doctrine will not divest a U.S. court from jurisdiction to hear a lawsuit alleging that members of an oil cartel are violating U.S. antitrust law, and (ii) amending the FSIA to exempt expressly antitrust actions under this legislation from the immunity granted to foreign nations under the FSIA.

[4] *See, e.g., Comment, Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 Amer. U. Law Rev. 1321, 1361 (2001) ("Judge Hauk's rationale [in *International Ass'n of Machinists*] . . . was flawed"); *see also, infra*, n. 5.

[5] *See* A. Rueda, *Price-Fixing at the Pump—Is the OPEC Oil Conspiracy Beyond the Reach of the Sherman Act* 24 Hous. J. Int'l Law 1, 58 (2001) ("The Crucial Question—Does OPEC Conduct Commercial Activities? The Clear Answer—Yes"); *Comment, Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC, supra,* 50 Amer. U. Law Rev. at 1361 ("The nature of OPEC's conduct was price-fixing, and, given OPEC's overriding concern of serving its own economic interests, it is indeed manifest that this conduct qualifies as commercial under FSIA"); *Note, The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments, 91 Yale Law J. 765 (1982).*

b. Act of State Doctrine

Another obstacle to the application of antitrust laws against OPEC member nations is the act of state doctrine, which declares that "a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *Int'l Ass'n of Machinists*, 649 F.2d at 1358; *see Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The act of state doctrine "is a prudential doctrine designed to avoid judicial action in sensitive areas." *Int'l Ass'n of Machinists*, 649 F.2d at 1359. The Ninth Circuit Court of Appeals upheld the decision dismissing the antitrust case against OPEC member nations in *International Ass'n of Machinists* based on its application of the act of state doctrine. *Id.* at 1361.

Congress has overruled the act of state doctrine in other contexts. For example, a statute known as the "Hickenlooper Amendment"[6] overturned the Supreme Court's application of the act of state doctrine in *Banco National de Cuba v. Sabbatino*, 376 U.S. 398 (1964), in which the Court refused to adjudicate the legality of expropriation by the Cuban government of property owned by U.S. nationals. The Fifth Circuit Court of Appeals recognized that the Hickenlooper Amendment "legislatively overruled" the application of the act of state doctrine to bar lawsuits asserting the invalidity of the Cuban confiscations. *Indus. Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 594 F.2d 48, 57 n. 7 (5th Cir. 1979); *see also, West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 829 (the Hickenlooper Amendment "overrides the judicially developed doctrine of act of state").

Overriding the act of state doctrine with respect to the actions of member nations of an oil cartel designed to raise the price of crude oil is consistent with the commercial act exception to the act of state doctrine recognized by the Court in *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 703–704 (1976), and the Second Circuit in *Hunt v. Mobil Oil Co.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). As Justice Stevens wrote in *Alfred Dunhill*, "subjecting foreign governments to the rule of law for their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their government acts." 425 U.S. at 703. Courts have on many occasions refused to apply the act of state doctrine to block antitrust lawsuits, ruling that antitrust policy overrides the prudential concerns motivating the act of state doctrine.[7]

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[6] The Hickenlooper Amendment is section 301(d)(4) of the Foreign Assistance Act, codified as 22 U.S.C. § 2370(e)(2).

[7] *See, e.g., United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (holding that conspiracy affecting U.S. commerce was not immune from judicial review under the Sherman Act even though the conspiracy was due in part to discriminatory foreign legislation); *see also Envtl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3rd Cir. 1988) (holding that act of state doctrine does not bar inquiry into defendant's use of illegal tactics to influence the awarding of a military procurement contract by a foreign government); *Indus. Dev. Corp. v. Mitsui,* 594 F.2d 48 (5th Cir. 1979) (holding that act of state doctrine does not preclude Sherman Act claim brought by American corporation against Japanese corporation for conspiring to have Indonesian government deny timber concession); *Williams v. Curtiss-Wright Corp.,* 694 F.2d 300 (3rd Cir. 1982) (holding that act of state doctrine does not stop court from examining motives of foreign government in refusing to purchase jet engines from plaintiff). As the court in *Williams* notes, "the act of state doctrine should not be applied to thwart legitimate American regulatory goals in the absence of a showing that adjudication may hinder international relations . . . in antitrust litigation of American commerce, there is a public interest in clearing monopolistic activities from the channels of American commerce, even though some of the conduct occurred in foreign countries." 694 F. 2d at 304.

Accordingly, the bill overrides the act of state doctrine in this context and declares that it shall not bar a court from adjudicating an antitrust lawsuit to enforce the NOPEC legislation. It expressly states 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 legislation. In sum, under this bill, Congress has determined that the policy goal of preventing anti-competitive international cartels that seriously harm American consumers by limiting the supply of a vital commodity, like petroleum, makes it appropriate for U.S. courts to adjudicate antitrust lawsuits against member nations in such a cartel, and outweighs the prudential concerns motivating the act of state doctrine.

c. Extraterritorial Application of U.S. Antitrust Law

Extraterritorial application of U.S. antitrust law is permissible under current law as long as the conduct produces a substantial effect in the United States. As the Supreme Court has explained, "it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effects in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *see also,* 1995 Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations, Section 3.1 ("Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.").

Consistent with these principles, this legislation expressly states that collective action to limit production or fix the price of crude oil or any petroleum product by any foreign state is illegal if "such action, combination, or collective action has a direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States." Crude oil is a fungible commodity and the price is set on the world market. The U.S. imports 60% of its crude oil needs [8] and there can be no doubt that the actions of OPEC or any other oil cartel will have a "direct, substantial, and reasonably foreseeable effect" on the supply and price of oil and petroleum products within the United States. Therefore, under the language of the new section 7A(a) of the Sherman Act to be added by this legislation, the supply limiting (or price fixing) actions of the member nations of OPEC (or any similar cartel) plainly would be reachable.

C. PROVISIONS OF NOPEC LEGISLATION

The provisions of this legislation are simple and straightforward. The bill adds a new section 7A to the Sherman Act. Section 1 of the existing Sherman Act declares that every "contract, combination . . . or conspiracy in restraint of trade" is illegal. The new section 7A(a) added by this legislation makes it illegal for "any foreign state, or any instrumentality or agent of any foreign state, to act collectively or in combination with any other foreign state, any instrumentality or agent of any other foreign state" . . .

[8] Date from U.S. Energy Information, found at http://www.eia.doe.gov/neic/quickfacts/quickoil.html.

"(1) to limit the production or distribution of oil, natural gas, or any other petroleum product;

(2) to set or maintain the price of oil, natural gas, or any petroleum product; or

(3) to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product."

The action of such a cartel must have a "direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States" in order to violate section 7A of the Sherman Act.

The new section 7A(b) of the Sherman Act specifies that a foreign nation engaged in an oil cartel shall not be immune under the doctrine of sovereign immunity from the jurisdiction of U.S. courts to enforce this statute. The new section 7A(c) likewise provides that no 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."

The new section 7A(d) of the Sherman Act added by this legislation only authorizes the Attorney General to enforce this statute. Versions of this legislation introduced in prior Congresses had also allowed enforcement by the Federal Trade Commission; however, in the sponsors' view, enforcement should be limited to the executive branch due to the foreign policy implications of enforcement actions under this legislation.

D. SUMMARY

The most fundamental principle of free market competition is that competitors cannot be permitted to conspire to limit supply or fix prices. This tenet is central to full and fair competition. This legislation will make clear that the actions of nations and their agents to limit supply and fix prices of oil, natural gas and other petroleum products to affect the U.S. market violates U.S. antitrust law, and it will authorize the Attorney General to enforce antitrust law against such nations, and prevent technical legal doctrines such as sovereign immunity and act of state from preventing actions for redress.

II. LEGISLATIVE HISTORY AND COMMITTEE CONSIDERATION

The NOPEC legislation was first introduced in the 106th Congress by Senator Kohl on June 22, 2000 (S. 2778). The bill had nine co-sponsors (Senators DeWine, Leahy, Specter, Grassley, Feingold, Thurmond, Schumer, Lieberman and Smith). It was reported favorably without amendment by the Committee on the Judiciary on September 21, 2000. No further action was taken on the NOPEC bill in the 106th Congress.

The NOPEC legislation was introduced again in the 107th Congress by Senator Kohl on March 30, 2001 (S. 665). The bill had seven co-sponsors (Senators DeWine, Leahy, Specter, Grassley, Feingold, Thurmond and Schumer). It was referred to the Committee on the Judiciary. No further action was taken on the NOPEC bill in the 107th Congress.

The NOPEC legislation was introduced again in the 108th Congress by Senator DeWine on April 1, 2004 (S. 2270). The bill was co-sponsored by Senator Kohl and 13 other Senators (Senators

Leahy, Specter, Grassley, Feingold, Schumer, Coleman, Durbin, Boxer, Wyden, Levin, Snowe, Dayton and Corzine). A hearing on the bill titled "Crude Oil: The Source of High Gas Prices?" was held at the Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights on April 7, 2004. The bill was reported favorably without amendment by the Committee on the Judiciary on April 22, 2004. No further action was taken on the NOPEC bill in the 108th Congress.

The NOPEC legislation was introduced again in the 109th Congress by Senator DeWine on March 8, 2005 (S. 555).[9] The bill was co-sponsored by Senator Kohl and 15 other Senators (Senators Leahy, Specter, Grassley, Feingold, Schumer, Durbin, Snowe, Levin, Wyden, Boxer, Corzine, Dayton, Coburn, Mikulski and Stabenow). The bill was reported favorably without amendment by the Committee on the Judiciary on April 14, 2005. On June 21, 2005, S. 555 was offered as an amendment to the Energy Policy Act of 2005, H.R. 6, and passed the Senate by voice vote on that date. This amendment was not included in the version of H.R. 6 that passed the House of Representatives. The NOPEC bill as an amendment to H.R. 6 was removed from H.R. 6 by the House-Senate Conference Committee.

On March 14, 2007, Senator Kohl introduced the No Oil Producing and Exporting Cartels Act of 2007 (S. 879). The legislation has 12 co-sponsors (Senators Leahy, Specter, Grassley, Feingold, Schumer, Durbin, Snowe, Coburn, Boxer, Levin, Lieberman and Sanders). The Committee on the Judiciary considered the bill on April 25, 2007, and agreed to report it favorably without amendment by unanimous consent.

III. Section by Section Analysis

Section 1 contains the short title of the No Oil Producing and Exporting Cartels Act of 2007.

Section 2 amends the Sherman Act, 15 U.S.C. §§ 1 *et seq.,* by adding a new section 7A. References below are to subsections (a) through (d) of this new section 7A—

Subsection (a) states that it shall be illegal and a violation of this Act for any foreign state, or any instrumentality or agent of any foreign state to act collectively or in combination with any other foreign state, or any instrumentality or agent of any other foreign state, or any other person, whether by cartel or any other association or form of cooperation or joint action—

(1) to limit the production or distribution of oil, natural gas, or any other petroleum product;

(2) to set or maintain the price of oil, natural gas, or any petroleum product; or

(3) to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product.

Subsection (a) also provides that the "action, combination, or collective action" must have a "direct, substantial and reasonably foreseeable effect" on the U.S. market for oil, natural gas,

[9] The NOPEC bill as introduced in the 106th, 107th, 108th and 109th Congresses was identical to the current version of the bill, with the one exception that these earlier versions authorized the Federal Trade Commission to bring suit to enforce its provisions. The current version of the bill does not authorize the Federal Trade Commission to enforce its provisions.

or other petroleum product to be within the ambit of section 7A of the Sherman Act.

Subsection (b) provides that a foreign nation engaging in conduct in violation of subsection (a) shall not be immune under the doctrine of sovereign immunity from the jurisdiction or judgments of U.S. courts to enforce this statute.

Subsection (c) provides that no 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.

Subsection (d) authorizes the Attorney General of the United States to enforce this section in any district court of the United States.

Section 3 amends the Federal Sovereign Immunities Act, 28 U.S.C. § 1605, to add an action brought under section 7A of the Sherman Act to the list of circumstances under which a foreign state is not immune from the jurisdiction of U.S. courts.

IV. Cost Estimate

The Committee sets forth, with respect to the bill, S. 879, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 4, 2007.

Hon. Patrick J. Leahy, *Chairman,*
Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for S. 879, the No Oil Producing and Exporting Cartels Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople.

Sincerely,

Peter R. Orszag,
Director.

Enclosure.

S. 879—No Oil Producing and Exporting Cartels Act of 2007

S. 879 would seek to prohibit foreign states from working collectively to limit the production, set the price, or otherwise restrain the trading of petroleum and natural gas when such actions affect U.S. markets. The bill would authorize the Department of Justice (DOJ) to enforce the legislation by filing antitrust actions in federal courts. The bill also would provide that foreign states that restrain trade in petroleum and natural gas would not be immune from the judgment of U.S. courts under the doctrine of sovereign immunity.

CBO cannot project the cost of implementing S. 879 because we have no basis for assessing the likelihood that the Administration might initiate antitrust actions against foreign states under the bill. Based on information from DOJ on the costs of investigations of alleged antitrust violations, CBO estimates that similar investigations to those that might be brought under S. 879 could cost up to $4 million per year, subject to appropriation of the necessary funds.

S. 879 could result in the collection of additional criminal or civil penalties. Collections of criminal fines are recorded in the budget as revenues, which are deposited in the Crime Victims Fund and later spent. Civil fines are also recorded as revenues. CBO cannot estimate the impact of S. 879 on direct spending and revenues because we cannot determine whether DOJ would file suit against alleged violators, whether the agencies would win such legal action, or the amount of any penalties that might be collected by federal agencies.

S. 879 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Daniel Hoople. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

V. Regulatory Impact Statement

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 879.

VI. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 879, as reported, are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is shown in roman type):

SHERMAN ACT (15 U.S.C. §§ 1, *ET SEQ.*)

SEC. 7A. OIL PRODUCING CARTELS.

(a) In General.—It shall be illegal and a violation of this Act for any foreign state, or any instrumentality or agent of any foreign state, to act collectively or in combination with any other foreign state, any instrumentality or agent of any other foreign state, or any other person, whether by cartel or any other association or form of cooperation or joint action—

(1) to limit the production or distribution of oil, natural gas, or any other petroleum product;

(2) to set or maintain the price of oil, natural gas, or any petroleum product; or

(3) to otherwise take any action in restraint of trade for oil, natural gas, or any petroleum product;

when such action, combination, or collective action has a direct, substantial, and reasonably foreseeable effect on the market, supply, price, or distribution of oil, natural gas, or other petroleum product in the United States.

(b) Sovereign Immunity.—A foreign state engaged in conduct in violation of subsection (a) 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.

(c) INAPPLICABILITY OF ACT OF STATE DOCTRINE.—No 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.

(d) ENFORCEMENT.—The Attorney General of the United States may bring an action to enforce this section in any district court of the United States as provided under the antitrust laws.'.

TITLE 28, UNITED STATES CODE, PART IV, CHAPTER 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

* * *

Section 1605. General exceptions to the jurisdictional immunity of a foreign state.

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

* * *

; or

(8) in which the action is brought under section 7A of the Sherman Act.

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